ARGUMENT

MADE BEFORE

THE COMMITTEE ON THE CONDITION OF AFFAIRS OF ARKANSAS,

BY

HON. JOHN McCLURE.

DECEMBER 17 AND 18, 1874.

Mr. Chairman and Gentlemen of the Committee:

I shall assume for the purpose of argument, that the first question to be determined in this case is, Which is the true government of the State of Arkansas—that created by the constitution of 1868, or that set up by the pretended constitution of 1874? This question determined, the next question is, Is it administered by the persons chosen in the manner and at the time prescribed by the constitution and laws of said State?

The land and water within certain geographical limits do not constitute a State, nor do the people resident therein constitute it. Therefore, before proceeding further in this matter, I regard it a matter of paramount importance to ascertain what constitutes a State.

The land and water, as I have already stated, within certain geographical limits, do not constitute a State; but the territory over which the State exercises jurisdiction. Nor do the aggregate inhabitants within such limits constitute a State. A political State—and the States of the Union are all of this character—is a body-politic qualified to subsist by perpetual succession, and from generation to generation. It is an organization where the innumerable will speaks as a unit by its legally authorized officers and representatives. It is an organization where, in consideration of the surrender of certain natural rights belonging to man, the corporate body called *the State* undertakes the protection of the life, liberty, and property of every person within its jurisdiction. To the State thus organized the first duty of every person is allegiance; it begins with life and only ends with death. Without the unity which a corporate organization gives, there is no such thing as *sovereign* will. The sovereign will in all corporate bodies must be a unit—a legal entity; and the moment the sovereign will ceases to be the *legal* will of the body-politic, that moment the sovereignty of the State is at an end, and in its stead you have the personal will of an unorganized mass. You no longer have an existing State government, nor the semblance of one. The moment the corporate people cease to exist as such, everything is resolved into its natural elements, and you have territory and people, but no government. Under a corporate existence, the people, in a legal sense, have no right, *of themselves*, to change the form of government in any other manner than that assented to at the time of its organization.

In their corporate character the people can change their organic law in such parts as to them may seem meet, so long as they do nothing inconsistent with the Constitution of the United States, and so long as they themselves observe the mode agreed upon when they organized themselves into a body-politic. If this mode be strictly adhered to, the political State and its legal entity, are preserved; but the moment a change is made by a departure from the corporate powers, or in a manner unknown to the organic act, you have destroyed the corporate existence of a State, and cut out the line of succession. The will of the corporate body is no longer heard. Its sovereignty no longer exists; and instead of one voice speaking for the whole, the voice of the State is distributed, not to the departments of government, but to an unorganized mob, who have withdrawn their allegiance from the State. Such action is nothing more nor less than *revolution*, and before entering upon it its consequences should be weighed against the evils which it is proposed to remedy. There are but two methods by which a written constitution can be changed: one is the method agreed upon at the time of its adoption, the other is revolution. The general assembly is clothed with power to propose amendments to the constitution, and if the people ratify the proposed amendments they become a part of the organic act. Instead of pursuing this method the general assembly has attempted to create a body *foreign and unknown to our form of government*, and clothe it with power, not to amend the constitution, but to erect *a new government*, founded on the allegiance of the same persons that owe allegiance to the government formed by the constitution of 1868. No one of the revolutionists, or friends of the new-constitution movement, pretend to be the *successors* of the government organized in 1868; they base their right on the power of the people to make and unmake their government at will, regardless of all constitutional inhibition. They claim to possess the right to withdraw their allegiance from one form of government and transfer it to another, of their own creation, at pleasure. They claim that they are not bound to show any line of succession, and that the people possess the inherent power to make governments. Whether a State of the Union can be wrenched from its orbit, and another form of government created to exercise jurisdiction over the same territory, without the consent or assent of Congress, and in a manner unknown to fundamental law, is a question that the Congress of the United States is called upon for the first time to determine.

We say that a State government is not an ephemeral thing; that a State government once formed continues and is binding on the people for all time, unless changed as therein prescribed, and that the causes which would justify *revolution* are the only causes that would absolve the people from a departure from the strict letter of the constitution. This idea of legitimacy and succession cannot be lost sight of, nor can the precedents be departed from. It was not out of compassion to an exiled Bourbon that Europe consumed one whole generation in blood and carnage. The struggle was, not to place a Bourbon on the throne because he was a Bourbon, but to sustain their ideas of legitimacy, and the line of succession; and, in the struggle now being made, every State in the Union will be affected by the precedent set in the Arkansas case. If Arkansas can change its form of government and its constitution, in a manner unknown to and at variance with it, the people of every other State of the Union may do the same thing every time they become dissatisfied with their officers, or whenever one set of partisans, by a reign of terror and violence, can disturb the public mind to such

an extent as to induce it to put another faction in power, by transferring their allegiance to another government.

The question presented to Congress by the Arkansas case is one of great importance, involving, among other things, a settlement of the question whether the constitution of a State can be altered, changed, or amended by the legislature, or the people, in any other manner than that prescribed by the organic act. The constitution of this State provides for its own amendment, and we insist, inasmuch as the people themselves have pointed out the manner of changing the organic law, that the mode pointed out must be followed, to the exclusion of all other. In other words, the enumeration and pointing out *how* a change in the constitution may be effected, excludes the idea that it may be done in any other manner, or in any mode not pointed out by the constitution itself. The legislative power of the State is vested in the general assembly, but it is lodged there, not for the creation of *new governments*, but for the enactment of laws, and with certain limitations and restrictions, among which are, that it shall not be so exercised as to conflict with the constitution itself, or in such manner as may result in the destruction of the instrument from which it derives its sole power to legislate. To deny the correctness of this proposition is to say that the creature is clothed with power to destroy its creator. Therefore, we say that the constitution having pointed out *how* the legislature and the people may change the same, that mode must be followed, and that the pointing out a specific mode for the legislature and the people to pursue in changing the organic act is an inhibition upon that department of government, and the people themselves, to pursue or propose any other.

Having in brief given you my idea of what constitutes a State, let us next inquire what a constitution is, and in making this inquiry I shall not attempt to give you such a definition of the word as is attributed to it by politicians, but as the same is defined by eminent judges and jurists. Justice Patterson, in the case of *Van Horne's Lessee* v. *Dorrance*, (2 Dall., 208,) asks, "What is a constitution?" In response to the question he said, "It is the form of government delineated by the mighty hand of the people, in which certain first principles of fundamental laws are established. The constitution is certain and fixed; it contains (now mark well what he says) the *permanent* will of the people, and is the supreme law of the land; it is paramount to the power of the legislature, and can be revoked or altered *only by the authority that made it.*"

"The constitution of a State is stable and permanent, not to be worked upon in the temper of the times, nor rise and fall with the tide of events. Notwithstanding the competition of opposing interests, and the violence of contending parties, it remains firm and immovable as a mountain amidst the strife of storms, or a rock in the ocean amidst the raging of the waves."

That the people of Arkansas, in pursuance of the reconstruction acts, framed and adopted a constitution in the year 1868, and that the State thus formed was admitted to representation in Congress, is a matter the records of Congress fully establish, and one which Congress will no doubt take judicial cognizance of. We start, then, with the admission that the State of Arkansas, as organized under the reconstruction acts, and the constitution of 1868, was a State of the United States, and as such entitled to the protection guaranteed by the fourth section of article four.

Starting from this point our inquiry is, as I have stated, whether the

State of Arkansas, as organized under the constitution of 1868, or as organized consistent therewith, is yet one of the States of this Union. All States have a *corporate* existence, and in this respect they are not unlike corporations; and, being so, the same general rules in relation to powers, succession, and liabilities, are not dissimilar. The stockholders in a private corporation may change daily. They may change their by-laws whenever it suits them provided they do not transgress or infringe upon the provisions of their charter. So it is with the people of a State. They may change the organic law thereof whenever it suits their convenience to do so, provided they do not infringe upon rights guaranteed by the social compact. Majorities, in a private corporation, are never clothed with power to do wrong, and so with all public corporations. I concede that the people of a State have a right to change their form of government, but *how* that change is to be effected, is the question now under discussion. That the people, *on their own motion*, and without the sanction of law, can assemble together and change the form of government, I most emphatically deny. And upon this proposition we have what may be regarded as a precedent, and a precedent that Congress is bound to follow.

The people of Rhode Island attempted to change their form of government without the assent or authority of legislative action. The movement was inaugurated without the forms of law, and a majority of the legal electors of the State participated in the proceedings and voted for the Dorr constitution that was attempted to be foisted on the people of Rhode Island. In speaking of that movement, Mr. Webster said: "In the exercise of political power through representatives we know nothing, we never have known anything, but such an exercise as should take place *through the prescribed forms of law*. The people limit their governments, National and State, but another principle is equally true and certain, and that is that they often limit themselves. They set bounds to their own power. They have chosen to secure the institutions which they establish against sudden impulses of mere majorities. But the people limit themselves also in other ways. They limit themselves, first, in the exercise of their political rights. They limit themselves by all their constitutions in two important respects—that is to say, in regard to the qualifications of *electors* and in regard to the qualifications of the *elected*. In every State, and in all the States, the people have precluded themselves from voting for everybody they might wish to vote for—they have limited their own right of choosing. They have said, we will elect no man who has not such and such qualifications. We will not vote ourselves unless we have such and such qualifications. They have also limited themselves to certain prescribed forms for the conduct of elections. They must vote at a particular place, at a particular time, and under particular conditions, or not at all. It is in these modes that we are to ascertain the will of the American people, and our Constitution and laws know no other mode. We are not to take the will of the people from public meetings nor from tumultuous assemblies, by which the timid are terrified, the prudent are alarmed, and by which society is disturbed. These are not American modes of signifying the will of the people, and they never were. If anything in this country not ascertained by a regular vote, by regular returns, and by regular representation, has been established, it is an exception and not the rule. It is an anomaly which, I believe, can scarcely be found. Is it not obvious enough that men cannot get together and count themselves, and say they are so many hundreds and so many thousands, and call themselves the people and set up a government? Why, another set of men,

forty miles off, on the same day, with the same propriety, with as good qualifications and in as large numbers, may meet and set up another government. What is this but anarchy? What liberty is there here but tumultuous, tempestuous, violent, stormy liberty—a sort of South American liberty, without power, except in its spasms—a liberty supported by arms to-day, crushed by arms to-morrow? Is that *our* liberty? Another well-settled principle is that when, in the course of events, it becomes necessary to ascertain the will of the people on a new exigency, or a new state of things or of opinion, the *legislative power* provides for that ascertainment by an ordinary act of legislation. *

* * In what State has an assembly, calling itself the people, convened without law, without qualifications, without certain officers, with no oaths, securities, or sanctions of any kind, met and made a constitution, and called it the constitution of the STATE? There must be some *authentic* mode of ascertaining the will of the people, else all is anarchy. It resolves itself into the law of the strongest, or, what is the same thing, of the most numerous for the moment; and all constitutions and all legislative rights are prostrated and disregarded."

An attempt was made to censure the President for recognizing the charter government, in the 23d Congress, but it failed. In that case, in response to Governor King, who represented the charter government, the President said: "I have, however, to assure your excellency that should the time arrive (and my fervent prayer is it may never come) when an insurrection shall exist *against the government of Rhode Island*, and a requisition shall be made upon the Executive of the United States to furnish that protection which is guaranteed to each State by the Constitution and laws, *I* shall not be found to shrink from the performance of a duty which, while it is most painful, is at the same time most imperative. I have also to say that in such a contingency the Executive *could not look* into any real or supposed defects of the existing government, in order to ascertain whether some *other plan of government* proposed for adoption was better suited to the wants and more in accordance with the wishes of any portion of her citizens. To throw the Executive power of the Government into any such controversy would be to make the President the armed arbitrator between the people of the different States *and their constituted authorities*, and might lead to usurped power, dangerous alike to the stability of the State governments and the liberties of the people. It will be my duty, on the contrary, to respect the requisitions of that government *which has been recognized as the existing government of the State through all time past*, until I shall be advised *in a regular manner* that it has been altered and abolished and another substituted in its place, by *legal* and peaceable proceedings, adopted and pursued *by the authorities* and the people of the State."

For assuming this position and for asserting he would sustain the *existing government*, a committee of the House of Representatives, after investigation, reported the following resolution as expressive of the sense of that body:

"*Resolved*, That the interference by the President of the United States with the military power of the Union, on the side of the late charter government of Rhode Island, against the constitution adopted in 1841, and by which the same was suppressed, was unauthorized by the laws of the United States, and in derogation of the rights of the people of Rhode Island."

This resolution failed to pass the House of Representatives, and from this it may be inferred that it did not meet the approval of that body, and, in point of fact, amounts to an indorsement of the President's ac-

tion. Not only this, it amounts almost, if not quite, to an expression by the House of Representatives that a State government cannot be overthrown by the people, *on their own motion*, regardless of the forms of law.

But it may be said that there is a great difference between the Rhode Island case and the Arkansas case. So there is. In the charter of Rhode Island there was no mode prescribing *how* a change in the organic act should be effected, and in the Arkansas case there is. In the one case the question was as to the *power of the people*, in their original and sovereign capacity, to *unmake* and destroy an *existing* government, and in the other the question is as to the *power of a pretended legislature* to do the same thing. I am aware that there are instances where State constitutions have been altered, changed, and amended in a manner at variance with the constitution of the State, and no doubt these cases will be cited as precedents in this; but I deny that they are, and assign two reasons therefor: First, there was no question as to the organization and legality of the legislature; and, second, before the action of New York, Illinois, and Tennessee can be accepted as *precedents*, CONGRESS must have taken such action in relation thereto as would authorize the application of the rule of *stare decisis*.

There is a great difference between a *precedent* and an *instance*. The cases cited in the States of New York, Illinois, and Tennessee are mere *instances*, and not *precedents*. A county may vote to take stock in a railroad company without authority of law. If the act be unquestioned and the citizens quietly submit and pay a tax levied to pay for the stock subscribed, such action would not constitute a *precedent*, and the citation of such a case would only be the citation of an *instance* where the people had submitted to a wrong. There must be an *adjudication* of a question by a tribunal having jurisdiction of the subject-matter of the controversy before a case can be cited as a *precedent*. We are here discussing a question of *law*, and not a question of force, acquiescence, or revolution. The *instances* cited wherein States have changed their organic law, in a manner at variance with the constitution, may be evidence of what was accomplished *by revolution*, but they cannot be cited to establish what the *law* is.

The supreme court of Pennsylvania, in the case of *Woods* v. *Secretary of State*, (Philadelphia Legal Gazette,) in speaking of this subject of "precedent," say:

"No argument for the implied power of absolute sovereignty can be drawn from revolutionary times. Governments thus accepted and ratified by silent submission afford *no precedents* for the power of a convention in a time of profound tranquillity, and for a people living under *self established* safe institutions. While conventions are well-known historical modes of procedure in the formation of constitutions, they prove nothing; for history does not define their powers, or estop the people from asserting their own. Limits must be set to power. Liberty absolutely demands security. No people can be safe in the presence of a divine right to rule, or of self-imputed sovereignty in their servants to bind them. * * * In our day conventions imputing sovereignty to themselves have ordained secession, dragged States into rebellion against the well-known wishes of their quiet people, and erected in the midst of the nation alien State governments and a southern confederacy. * * * We have seen a public sentiment formed and elections carried in a few months, and yet the excitement was as short-lived as it was sudden, moving like a whirlwind. Such excitements have filled a legislature with its partisans. * * * Once assembled, a convention, according to this *dogma*, is all-powerful,

and may annul any declaration in the bill of rights, and proclaim a constitution without let or hinderance. The fundamental rights of the people, the true principles of civil liberty, the nature of delegated power, and the liability of the people to temporary commotion, all rise up in earnest protest against such a doctrine of imputed sovereignty in the mere servants of the people."

I assert that the people of the State of Arkansas cannot change their constitution in any other mode or manner than that pointed out by the constitution itself. The general rule in relation to the construction of a constitution is that it is a *limitation* upon the powers of the legislative department, and a *grant* to the executive and judicial departments. But to all general rules there are exceptions. Ordinarily, in speaking of the power of the legislature, we say that it may do anything that it is not *expressly* prohibited from doing by the constitution, but this is not true. The true rule is that it may do anything it is not prohibited from doing by *express* inhibition, or *necessary implication.*

Where the constitution directs or points out *how* a thing is to be done, this pointing out amounts to an implication that it is not to be done in any other manner, and it amounts to an inhibition upon the legislature, to pursue any other course, to accomplish the same object, or produce the same result.

In the case of the *C. W. & Z. R. R.* v. *Clinton County*, (1 O. S., 84,) Judge Ranney says:

"The authority of the general assembly is much too broadly stated, when it is claimed that all their acts must be regarded as valid which are not *expressly* inhibited by the constitution." Continuing, he says: "A moment's attention to principles, which must be regarded as fundamental, in all American systems of government, will demonstrate the unsoundness of such a conclusion. * * Unlike the constitution of the United States, and from the necessity of the case, no attempt at a specific enumeration of *the items of legislative power* is made in a State constitution. This must always be determined *from the nature of the power exercised.* If it is found to fall within the general terms of the grant, we can only look to the other parts of the constitution for limitations upon it; if none are there found, none exist. But as the general assembly, like other departments of the government, exercises *delegated* authority, it cannot be doubted that any act passed by it, not falling FAIRLY *within the scope of legislative power*, is clearly as void as though expressly prohibited."

There is a vast difference between *legislative* power and *political* power.

Now and then you may find a loose, unguarded expression, where some persons of judicial attainments may have said that the legislature was the *political* department of the government; but it is a perversion of the meaning of words to make such a declaration.

I know of but two instances where the legislature of Arkansas is authorized to exercise *political* power, or power of a political nature: the one case is in the selection of a senator to represent the State in Congress, and the other is, when the legislature is proposing and acting on amendments to the constitution. In all other respects, the sole power of the legislature is *to legislate.*

Let us see if I am not borne out in the view I have stated.

Section one of Article X, of the constitution, is as follows:

"The *legislative* power of this State shall be vested in a general assembly, which shall consist of a senate and house of representatives."

What is the meaning of the words "legislative power?" Bouvier

defines it thus: "The authority under the Constitution to make *laws*, and to alter or repeal them."

Having seen where the *legislative* power is lodged, let us see where the *political* power is.

The first section of the bill of rights declares that, "*All political* power is inherent (not in the legislature, but) in the people."

Having shown, conclusively, that no power but *legislative* power is vested in the general assembly, and that all *political* power, by the terms of the constitution, is declared to be in the people, let us return and examine the constitution, and see, as Judge Ramney says, if the act alluded to comes within any limitation of the constitution, either express or implied. The first section of the bill of rights declares that, "Government is instituted for the protection, security, and benefit of the people, and *they* have a right to *alter* or reform the same, whenever the public good may require it."

The declaration is, that the right to "alter" or "reform" the Government is a right that belongs to the *people*. Now, how is this *alteration* or *reformation* to be brought about? And have the people pointed out any method by which this is to be accomplished?

Article XIII of the constitution reads as follows:

SECTION 1. Any amendment to this constitution may be proposed in either house of the general assembly, and if the same shall be agreed to by a majority of the members elected to each of the houses, such proposed amendment shall be entered on the journals, with the yeas and nays taken thereon, and referred to the legislature to be chosen at the next general election, and shall be published as provided by law for three months previous to the time of making such choice, and if the general assembly so next chosen, as aforesaid, (and if) such proposed amendment, or amendments, shall be agreed to by a majority of all the members elected to each house, then it shall be the duty of the general assembly to submit such proposed amendment or amendments to the people in such manner and at such time as the general assembly may provide, and if the people shall approve and ratify such amendment or amendments, by a majority of the electors qualified to vote for members of the general assembly voting thereon, such amendment or amendments shall become a part of the constitution.

SECTION 2. If two or more amendments shall be submitted at the same time they shall be submitted in such a manner that the electors shall vote for or against each of said amendments.

This is the mode pointed out by the people, by which the constitution was to be "*altered*" or "*reformed*." In pointing out that mode the members of the legislature are made instruments to execute the will of the people in altering or reforming the government. Now, the question arises, does this fact, of itself, raise the implication that the constitution was not to be changed in any other manner? I think it does. In the case of *Page* v. *Allen*, (58 Pa., 338,) it was held that "the expression of one thing in the constitution is the exclusion of things not expressed."

Tested by this rule, the expression of *how* a constitution may be changed, excludes the idea that it may be done in another and different manner than the mode therein specified. (*Cronise* v. *Cronise*, 54 Pa., 255; *Twitchell* v. *Blodget*, 13 Mich., 127.)

In the case of *People* v. *Field*, (2 Scam., 79,) the supreme court of Illinois said, "Where the means of a granted power are given, no other or different means or powers *can be implied* on account of convenience or of being more effectual."

That the constitution points out *how* the members of the legislature

must proceed in the event a change is desired, in the fundamental law, cannot be denied. This being true, the rule laid down in the case of The People *v.* Field, would place the act calling a constitutional convention *outside* of the scope of the legislative power.

Vattel says, (p. 11,) "It is asked whether the *legislative* power extends to the fundamental laws; whether they may change the *constitution* of the State?" In response to this question he says, "The principles we have laid down lead us to decide, *with certainty*, that the authority of these legislators does *not* extend so far, and they ought to consider the fundamental law as sacred if the nation has not in *express* terms given them power *to change it;* for the constitution of the State ought to possess stability, and since *that* was first established by the nation, which afterward intrusted certain persons with the legislative power, the fundamental law is excepted from their commission.

"It is visible that the society only intended to make provision for having the State constantly furnished with LAWS suited to particular conjunctures, and, for that purpose, gave the legislature the power of *abrogating* the ancient civil and political laws that were not fundamental, and *of making new ones.*"

Here we have it asserted that the *legislative* department cannot change the constitution *unless the power is conferred.* In the present instance the *power is conferred*, and that brings us back to the proposition that we started with, that if a *power be conferred*, and the manner of exercising it is pointed out specifically, whether or not that pointing out does not amount to an *inhibition* on the legislature to pursue any other?

Judge Patterson, in the case of *Van Horne's Lessee* v. *Dorrance*, (2 Dall., 303,) in speaking of the power of a legislature said, "What are legislatures? Creatures of the constitution; they owe their existence to the constitution; they derive their powers from the constitution. It is their commission, and therefore all their acts must be conformable to it or else they will be void. The constitution is the work or will of the people themselves in their original, sovereign, and unlimited capacity. *Law* is the work or will of the legislature in their *derivative* and *subordinate* capacity. The one is the work of the creator, and the other of the creature. The constitution fixes limits to the exercise of legislative authority and prescribes the orbit within which it must move."

After citing the article in the bill of rights, declaring that all men have a natural and unalienable right to worship God according to the dictates of their own conscience, and the thirty-second section of the constitution that ordains "that all elections whether by the people, or in assembly, shall be by *ballot*, free and voluntary," he asks, "Could the legislature have annulled these articles, respecting religion, the rights of conscience, and elections *by ballot?* Surely not. As to these points there was no devolution of power; the authority was purposely withheld, and reserved by the people to themselves. * * * The constitution of the State is stable and permanent, not to be worked upon by the temper of the times, nor to rise and fall with the tide of events."

But it is urged that *the people* in their *sovereign* power may do anything; if this be true, no act of the legislature was needed; if it is not true, an act of the legislature, not within the scope of *legislative power*, has not conferred any right on the people. There is quite a delusion in the minds of many apparently well-informed people, that the *sovereignty* of the State resides with and remains *in the people* in a constitutional government. This, however, is not true.

Mr. Carpenter, in discussing the question of sovereignty in the peo-

ple, says, (4 Wis., 590,) "Sometimes it is said *sovereignty* is with the people. All this jargon comes from confounding the rights of the people *under* the government with the right of the people *to overthrow* the government. 'The sovereignty of the people' is to a politician a sweet morsel; to a lawyer and judge an unmeaning and senseless sound. * * * The people, under a government, have none of the attributes of sovereignty. They establish the government, and in so doing part with their sovereignty and the *government* when established is as completely sovereign as Alexander is sovereign in his dominions. The sovereignty of the people *under* the government is a *fiction*."

Quoting from Vattel, (ch. 4,) he says: "Sovereignty is that public authority which commands in civil society, and orders and directs what each citizen is to perform to obtain the end of its institution. This authority originally and essentially belonged to the body of the society, to which each member submitted and ceded his natural right of conducting himself in everything as he pleased, according to the dictates of his own understanding, and of doing himself justice."

Mr. Ryan, who I understand is now on the supreme bench of Wisconsin, in arguing and defining this thing called "the sovereignty of the people," says: "We confound the idea of sovereignty with that of *independent power*. In international law nations are called *powers*, but not sovereignties * * * . Wisconsin is a *power* among the other States of the nation; it may be a sovereign power so far as by that is understood *an independent power*, and, except when it has parted with power by treaty or confederation; but in its internal organization there is no sovereignty—it is a mere idea, a dream, a dormant fee, which, at some future period, may be invoked and invested in a sovereign. The sovereign is the absolute power of law, of justice, and administration. I deny that in the people of this State (Wisconsin) is vested any such power. In our government there is no source from which such power can be derived. God gave us no sovereignty in a state of nature. The *aggregate* people of this State have no sovereignty, no absolute power of tyranny over the humblest person in its limits."

Orton, in speaking of the same subject, says: "If the people are sovereign, they are above the *law*, they are above the constitution. But can any one man, can any ten men, can a majority of the people, defy the law, or violate the law? Suppose they all went on a certain day and voted to destroy the constitution; is it destroyed? The waves of popular tumult may dash against it in vain. The constitution cannot be changed, except *constitutionally*. It provides in *itself* just how it may be amended, and it can be amended *in no other way*. Can the people meet to-morrow and vote to strike out Article V? They cannot do it. It can only be done in the course provided by the constitution itself; and if the people cannot *amend* it, they certainly cannot *abrogate* it."

Judge Smith, (4 Wis., 756,) in commenting on the power of the people and the force of the constitution of Wisconsin, says: "They ordered a convention of delegates of the people to form a constitution, which should be proposed to the people as the fundamental law of the State, not for the guide and government of the agents only, but also for the guide and government *of the people* of the State, to abide and continue until they should alter the same *according to the forms by them prescribed*."

In the case of *Price* v. *Foster*, (4 Harr., 4–8,) the supreme court of Delaware said:

"The legislative, executive, and judicial powers compose the *sovereign power* of a State. The *sovereign power*, therefore, of this State resides with the legislative, executive, and judicial departments. *Having thus*

transferred the sovereign power, the people cannot assume any portion of it. To do so would be an infraction of the constitution and *a dissolution of the government.* Nor can they interfere with the exercise of any part of the *sovereign power*, except by petition, remonstrance, and address. They have the power to change or alter the constitution, but this can be done *only* in the mode prescribed by the *instrument itself.* The attempt to do so in any other mode is *revolutionary.* * * *

"Neither the legislative, executive, nor judicial department, separately, nor all combined, can devolve on the people the exercise of any part of the *sovereign power.* The assumption of power to do so would be usurpation. The department arrogating it would elevate itself above the constitution, overturn the foundation on which its own authority rests, demolish the whole frame and texture of our republican form of government, and prostrate everything to the worst species of tyranny and despotism or the ever-varying will of an irresponsible multitude. * * * * *

The powers of government are trusts of high importance, and in no case whatever can they be transferred or delegated to any other body of persons, not even to the whole people of the State."

I think the citations thus far made must convince you of three things: First, that only *legislative* power is vested in the general assembly; second, that the *political* power of the government is in the *people;* and, third, that the *sovereign* power of the State is vested in the *government.*

The constitution of the State of Massachusetts contained a provision for its amendment, in every respect similar to that of this State, and the house of representatives of that State submitted the following question to its supreme court:

"Whether, if the legislature should submit to the people, to vote upon, the expediency of having a convention of delegates of the people, for the purpose of revising or altering the constitution of the Commonwealth, in any specified part of the same, and a majority of the people voting thereon should decide in favor thereof, could such convention holden in pursuance thereof act upon and propose to the people amendments in other parts of the constitution, not specified?"

Now mark the answer:

"Considering that the constitution has vested *no authority* in the legislature, *in its ordinary action*, to provide *by law* for submitting to the people the expediency of calling a convention of delegates, for the purpose of revising or altering the constitution, it is difficult to give an opinion, what would be the power of such convention if called." (6 Cush., 673.)

The point to which I desire to direct your attention in this answer is, that Judge Shaw plainly and distinctly asserts, that in its *ordinary action* (legislation) the legislature *is not vested with authority to submit such a question* to the people. The constitution of this State has vested no authority in the legislature to submit such a question to the people of Arkansas, unless the power belongs to it under the scope of ordinary legislative power; and this the supreme court of Massachusetts has distinctly and emphatically asserted it did not. The house of representatives of Massachusetts also submitted another question to the supreme court of that State, which it answered, that I regard as conclusively settling the question, so far as the *law* of the case is concerned. The question was, whether the constitution of Massachusetts could be amended, altered or changed, in any other manner than that pointed out *by the constitution itself?*

In reply to this the court said:

"Considering that previous to 1820 no mode was provided by the constitution for its amendment; that no other power for that purpose, than in the mode alluded to, is anywhere given in the constitution, by implication or otherwise, and that the mode provided thereby appears to have been carefully considered, and the power of altering the constitution cautiously restrained and guarded, we think a strong implication arises against the existence of *any other power* under the constitution, for the same purpose."

The constitution of Arkansas, like that of Massachusetts, upon its face, shows that the mode of altering or reforming the same was carefully considered, and cautiously restrained, and if a strong implication arises in the one case it arises in the other. This Massachusetts case is the only instance I have come across where a *judicial* tribunal has construed the powers of a legislature under a constitution almost indentical with our own.

I could cite the expressions of other judges, and courts of ability, all going to prove and sustain the *law* as stated by the supreme court of Massachusetts; but, if what the supreme courts of Delaware, Wisconsin, and that of Massachusetts have said is not conclusive, and the *revolutionary* action of what *has been done* in other States without warrant or authority of *law*, and in defiance therof, is to be regarded as precedents of *right* instead of *power* and *wrong*, the decision of the supreme courts of every State in the Union would not satisfy or convince the judgment of those who point to *successful revolutions* to evidence what the *law* is.

The rule of construction applicable to a State constitution ought to be uniform; that is, words that by implication amount to an inhibition in one portion of the instrument should raise the same implication in another. Section 19 of article 6 of the constitution of Arkansas declares that, "contested elections (for the office of governor, &c.) shall be determined by both houses of the general assembly, in such manner as is, or may hereafter be, prescribed by law."

After the adoption of the constitution containing the section quoted, the legislature passed an act allowing the claimant to an office to commence suit in the circuit court for the recovery of a State or county office wrongfully held by another. Under the statutes alluded to Brooks commenced an action against Baxter, in the proper court, for the recovery of the office of governor. In April last a judgment of ouster was rendered against Baxter, and a judgment for the office in favor of Brooks. The court rendering the judgment was one of original and general jurisdiction. *Before* judgment no writ of prohibition was applied for or granted, and *after* judgment no supersedeas was applied for or granted, nor was the judgment even appealed from by Baxter. After the rendition of this judgment, the record in the case alluded to was introduced as evidence in a cause pending in the supreme court to establish Brooks's right, as governor, to draw on a fund placed by law under the control of the *governor of the State*. For the reason stated the court admitted the record as evidence, and upon that state of case directed the treasurer of State to pay on the requisition of Brooks as governor.

Baxter, treating both judgments as nullities, appealed to the President for aid to oust Brooks, who had taken possession, from the office of governor. The Attorney-General, in disposing of the question, assumes the position that, under the provisions of section 19 of article 6, the act conferring jurisdiction on the courts is void, and that the legislature cannot delegate an *exclusive power* to another body or tribunal for the determination of a question that it must determine for itself. If you

will examine the provision cited, you will find that no exclusive words are used; you will find that no prohibitory words are used; yet the Attorney-General is of opinion that the designation of the general assembly to hear and determine a question of *contest*, inhibits any other tribunal from attempting to decide or deciding the same question, and the President, acting on that opinion, commanded Mr. Brooks and his friends to disperse. Now, if it be true that the mere designation of the general assembly to hear a *contest* for the office of governor, (for it is a power the legislature could have conferred upon *itself* by an act, if the constitution had been silent,) precludes that body from delegating its power in case of contest, is it not equally true that the designation of the members of the general assembly as being the persons who should propose and pass upon amendments to the constitution, precludes them from providing that it shall be done by any one else? What is the difference between an attempt to confer jurisdiction on a *court* to hear and determine a matter that should be determined by the legislature, and an attempt to confer the power *on a set of delegates* to amend the constitution, when the instrument itself says it shall be amended by the direct action of the members of the general assembly?

The constitution was intended by the people, when it was framed and adopted, to create a *permanent* form of government. The eighth section of article five provides for the enumeration of the inhabitants of the State in the year 1875, and every ten years thereafter. It also provides "that there shall be no apportionment (for representatives) other than that made in this constitution, until *after* the enumeration to be made in the year 1875." This clause evidences an intention to create a continuous government, and one the representation in which was not to be changed until after the year 1875. This clause is just as much a limitation on the people as upon the legislature.

The practice and theory of all the States has been that, if the constitution was silent as to the manner and mode of amending or altering the instrument, the legislature was clothed with power to submit the question to the people, not only as to the propriety of calling a convention to amend the constitution, but to make a new constitution. The reason why the legislature was conceded the power of providing the mode and manner of taking the sense of the people on the subject of reforming and amending the organic act is, that in this manner *revolution* was avoided and the line of succession could be preserved. Without a law, the voice of the people could not be heard in an *authorized* form. An *unauthorized* expression of the people cannot confer power. The people can only speak through the forms of the law. With this statement of facts before us, let us examine what could have been the object of the framers of the constitution when they inserted the thirteenth article in the constitution of the State of Arkansas.

Let us examine that article and see what *intent* is disclosed therein. I insist that the whole spirit and intent of the article evinces a disposition to change the former rule and to spare the people the cost and expense of electing delegates to a convention, and to confer the powers that had been previously exercised by a constitutional convention on the members of the legislature. It not only discloses such an intent, but it shows that the constitution was not to be hastily amended or changed. That the people did intend to carefully guard, and restrain any sudden and hasty change in their form of government, is evidenced by the fact that the amendments should be submitted to two different legislatures. It is not only evidenced in this, but it is evidenced by the fact that the proposed amendment should be published three months before the election of

the representatives that are to pass upon the amendment, immediately before the same is submitted to the people. It is not only evidenced in this, but it is evidenced in the fact that no amendment should be submitted to the people and the State charged with the expense of an election, unless the amendment was of such a character as to commend it to at least a majority of the members elected to each branch of the general assembly.

Now take all these evidences of an intent to prevent any hasty amendment or alteration of the constitution, and tell me whether they do not raise an implication that *less* than a majority of the members of each house should have the power to take the initiative for the *destruction* of a constitution, they had not the power to take the preliminary steps for its amendment. Does not the fact that less than a majority could not take the initiatory to *amend* the constitution, raise the implication that they could not take the initiative to destroy it?

It seems to me that the obvious intent of the thirteenth article of the constitution is to *inhibit* the submission of an amendment to, or a change in, the same to be made unless "a majority of the members elected to each house" shall be of opinion that a necessity existed for a change in the organic act. Forty-two members in the house constitute a quorum and fourteen in the senate. Twenty-two members of the house constitute a majority of a quorum, and eight members of the senate constitute a majority of a quorum in that body. Can it be true that *twenty-two* members of the house and *eight* of the senate are clothed with power to provide a means whereby the constitution may be *abolished*, when the same instrument requires the assent of *forty-two* members of the house and *fourteen* members of the senate to assent to a proposition to amend the same, on *two* different occasions, before the people can vote thereon.

The *inherent* right of the people is one thing; but just *what*, is not well defined. No matter what it is, it is separate and distinct from the rights of the members of the legislature. The "*inherent* rights" of a member of the general assembly, if he has any rights at all, is to *legislate*, and if he desires the constitution amended, the constitution points out to him how *he* must proceed, and he can proceed in no other manner. If "the people" of a State have the right to change their form of government, in a manner at variance with the constitution, then "the people" of the United States have the same right. The Constitution of the United States, like the constitution of a State, is the work of the people. If they can destroy the one, they can destroy the other.

Article 5 of the Constitution of the United States declares:

"The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution; or on the application of the legislatures of two-thirds of the several States shall call a convention for proposing amendments, which in either case shall be valid to all intents and purposes as a part of this Constitution, when ratified by the legislatures of three-fourths of the States, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by Congress."

There is nothing in the language of this section that *in express terms* prohibits the Congress of the United States from passing a law and taking the sense of the people on the subject of calling a constitutional convention, and the election of delegates thereto; yet I apprehend no one of you would entertain such a proposition for a moment. Why is it that you would entertain it in the one case and not in the other? Under what rule of construction can you say that the language amounts

to an inhibition in the one case, and not in the other? The rule of construction, applicable to the Constitution of the United States is, that Congress has no powers save those granted in express terms or such as arise by necessary implication. It is construed almost with the strictness of a *grant*. The rights not granted are reserved to the States, or the people respectively. Why is it then that the people of the United States have not the power to alter, amend, or abolish the Constitution of the United States by a convention of delegates chosen in pursuance of an act of Congress, at variance with the fifth article thereof? The answer is, they have pointed out *how* the change should be made, and bound themselves to pursue that method. The duty of obedience is a necessary corollary to the right to contract. The very right to institute government, the right of individuals to part with a portion of natural power for the advantages of associated strength, the vesting of power in a common agency, proceeds upon the hypothesis, that the terms of the compact will be faithfully observed. If a mere *majority* may trample on the terms of the compact, when that majority has solemnly agreed that the terms of the compact shall not be altered without the assent of *two-thirds*, how are the weak to protect themselves against the oppression of the strong? How are the timid and prudent to protect themselves against violence, and the accumulations of labor against rapacity?

No doubt it will be argued that the people have an *inherent* right to make governments and unmake them at pleasure, that they cannot limit or restrict themselves if they desire to, and that there is no power to supervise their action. This is the argument of the demagogue, the argument of the fanatic; a delusion that led the South into rebellion, and which cost the North three hundred and twenty thousand lives to demonstrate was not true. The object of the people in forming civil government is to establish justice, insure domestic tranquillity, promote the general welfare, and secure the blessings of liberty to themselves and posterity. It is to this end constitutions are adopted and governments instituted. A constitution once adopted and a government organized thereunder, should not for light and transient causes be set aside. The causes that justify a departure from the terms of the compact are those that would *justify revolution*. The signers of the Declaration of Independence declare that it is only the right of the people to change their form of government, and throw off their allegiance, when the government fails to protect them in life, liberty, property, and the pursuit of happiness. These are inalienable rights; *these* are the rights that cannot be alienated. The right to vote, and to make and unmake governments at pleasure, is not one of the inalienable rights of mankind or of an elector. The people of the *United States* limit themselves, and why cannot the people of the *States* do the same thing? Not a *temporary* limitation, but one that must exist for all time. For instance, the Constitution of the United States can never be so amended, without its consent, as to deprive any one of the States of equal representation in the Senate.

Nor is it true that there is no power to supervise the action of the people in the alteration of the constitution of a State. The object of section four of article four of the Constitution of the United States was to create a supervisory power over this very question, and to protect the States against a revolution founded on fraud or conspiracy, or a revolution brought about by actual bloodshed and domestic violence.

"The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion, and on application of the legislature, or of the executive (when

the legislature cannot be convened,) against domestic violence." This language presupposes the existence of a State government having a legislature and an executive. The contingency contemplated by the Constitution has arisen in the State of Arkansas. The executive of the State of Arkansas has applied to the President to aid him in suppressing an insurrection against the State government thereof. The President seems to be in doubt as to who the executive of Arkansas is, or, if not in doubt on that subject, as to which government the guarantee applies. The guarantee is, not that the *President* shall guarantee to each State of the Union a republican form of government, but that the *United States* shall. Congress, by the terms of the first article of the Constitution, is clothed with power "to make all laws which shall be necessary and proper for carrying into execution * * * all powers vested by this Constitution *in the Government of the United States*." The guarantee is that of the United States, and by the terms of the section quoted, Congress is designated as the power to carry the guarantee into execution. We are here, among other things, asking the exercise of this power and the enforcement of the guarantee.

If you will but stop and reflect one moment, you will at once see there is no necessity for indulging in the idea that *the inherent right of revolution* belongs to the people of a *State*. There is no state of case, nor can one be stated, that will justify the people of a *State* in embarking in, or resorting to, a revolution, either actual or political, to change their form of government. Independent powers or independent sovereignties may do as they please, but a *State* is not an *independent power*, nor is it an *independent sovereignty*. The States are integral parts of the American Union, and, as such, are guaranteed protection, by section four of article four of the Constitution of the United States, against invasion and domestic violence. Not only this, but by the act of Congress of February 28, 1795, power is conferred on the President, "in case of insurrection in any State *against the government thereof*," to suppress such insurrection. Not only this, but a republican form of government is guaranteed to the people of a State by the Government of the United States. This being true, what is there that justifies violence or revolution toward an existing State government? You may say its officers may become corrupt, that the necessities of the times, and the progress of events, absolutely demand a change. You may say all this, and it may all be admitted to be true, and it presents no state of case that cannot be remedied by amendment and under the forms of law. If the State government should be administered corruptly and oppressively, the remedy of the people is not destroyed, nor is it taken away. If a government that *was* once republican in form has ceased to be such, and the legislature would take no action to remedy the matter, the people are not powerless, nor would such state of case justify revolution. The first amendment to the Constitution of the United States asserts that the people have "the right peaceably to assemble, and to petition the Government for a redress of grievances." Would it not be a "grievance" if the officers of government should so administer the State government, that it was no longer republican in form? Is not Congress clothed with power to ascertain the fact whether a republican form of government exists in a State? or is the question as to whether a republican form of government exists in a State to be determined *by the people of the State?* The Kentucky and Virginia resolutions of 1798 asserted that the States had an equal power with the Government to judge of such questions. The people of ten or twelve States of this Union asserted some such

doctrine in 1861, and the matter was submitted to the arbitrament of arms. In the contest the advocates of that heresy lost, and, notwithstanding this, we find these self-same people asking a recognition of their doctrine at the hands of a Congress composed, politically, of the men who furnished the sinews of war that decided the question. Arkansas, at the beginning of this controversy, *was* a State of the Union, and the presumption is that it had a government that was republican in form. If that republican form of government ceased to exist, when did the change take place, and when was such a decision rendered, and by what tribunal? Congress has not decided that there is not a republican form of government in Arkansas; but it may be said the people of Arkansas have. I reply by saying that the people of Arkansas have no jurisdiction of the subject-matter, and no power to decide such a question. In order to show you that the people of a State cannot decide such a question for themselves, let me call your attention to a matter of history. The legislature of 1866–'67, composed of the same kith and kin as those who now represent the Garland government, passed the following joint resolution:

"*Resolved*, That the existing government of the State is hereby declared to be 'republican in form,' in conformity with the constitution and constitutional law, and, as such, is the true and proper government of the State, and of right ought to be recognized as a member of the Federal Union, and entitled to its representation in Congress, with all the rights and privileges of other States."

Now, if this was a political question, for the *State* to determine, I submit to you that the action of the legislature settled the question; but Congress, in less than one month after the passage of this resolution, passed an act the commencement of which is, "Whereas, no legal State governments, or adequate protection for life or property, now exist in the rebel States of Arkansas, &c.: Therefore, be it enacted," &c. The ground for interference, as will be seen, is that there is no "adequate protection for life or property." Hence, there was not a republican form of government, and Congress took the necessary steps to furnish it. How it is that men will contend that the people of a State have an *inherent right of revolution*, to violently displace an existing State government which Congress has said was republican in form, when the right of amendment is given, and when, by petition to Congress, the people may have that form of government preserved, is beyond my comprehension or understanding.

But let us look at this thing from another stand-point. For the purpose of argument, let us suppose that the people have an inherent right to alter or change their constitution at pleasure, *under the forms of law*, and that the legislature has the undoubted power to provide for calling a constitutional convention. At this point, it becomes necessary, for the elucidation of the question, to refer to the statement of facts that is established by the evidence taken by the committee. It is in evidence that an election was held in the State of Arkansas, on the 5th of November, 1872, for the election of State officers from governor down, and for the election of members of the general assembly. It is in evidence that a general assembly was duly organized in January of 1873, the members of which (saving and excepting such members of the senate as held over) were elected at the November election in 1872. It is in evidence that there was not a vacancy in either branch of the general assembly at the time of its adjournment, in April of 1873, and that, on the 25th day of that month, the legislature adjourned *sine die*. It is in evidence that during the session no vacancies were declared in either house that

were not filled during the session; that but *six* members of the house and none of the members of the senate resigned between the adjournment, in April of 1873, and the 4th day of November, 1873, (the day of election,) and that no member of either house died during the period mentioned; that no writs of election have been issued, and no elections held to fill vacancies occurring between the 4th of November, 1873, and the 10th of May, 1874; that, on the 22d of April, 1874, Elisha Baxter issued his proclamation as governor, convening the legislature in extraordinary session on the 11th of May, 1874, and that, at the time of issuing said proclamation, a judgment of ouster had been entered against said Baxter as governor, by the circuit court of Pulaski County, in a cause pending therein, wherein Joseph Brooks was plaintiff, and Elisha Baxter defendant; that said judgment had neither been appealed from, by said Baxter, nor had it been superseded; that *fifteen* members of the house and *four* members of the senate, that were elected in November of 1872, and that were in the general assembly that adjourned on the 25th of April, 1873, met at a place other than the capitol-building, (the usual place of meeting,) and within the closed military lines of Elisha Baxter, where no man or member of the general assembly could enter without a pass from one of his military officers, on the 14th day of May, 1874; and that said *fifteen* members of the house and *four* members of the senate, there not being a quorum in either branch of the general assembly, instead of sending for absent members and adjourning from day to day, as the constitution requires, admitted twenty-seven persons in the house, and *ten* in the senate, to fill vacancies, that did not occur by *death* or *resignation*, "during a recess of the general assembly," and that had never been declared to exist *by the general assembly*; and that at the time the legislature was convened in extraordinary session by Elisha Baxter, there was a quorum of each house in existence, about whose right to seats in the general assembly there was no question; that, by the recognition of *twenty-seven* persons as members in the house, and by the recognition of *ten* persons as members in the senate, who were not entitled to seats, each house, on the 13th day of May, 1874, declared itself organized, and so notified Elisha Baxter.

I take the position that a legislature thus constituted and organized had no authority or power to legislate for the people of Arkansas, and that its every act was a nullity.

The thirteenth section of article 5 of the constitution is as follows:

"A majority of the members of each house shall constitute a quorum to transact business, but a *smaller number* may adjourn from day to day and compel the attendance of *absent* members, in such manner and under such penalties as each house may prescribe."

Section 7 of the same article is as follows:

"The members composing the senate shall be twenty-six, and of the house of representatives, eighty-two."

From this it will be seen that it takes fourteen to make a quorum in the senate, and forty-two in the house.

Chief-Justice Randall, in construing a provision of the constitution of Florida that is a literal copy of the above, says, (12 Florida, 683:) "That by the constitution a smaller number than a majority of the whole number *may only adjourn from day to day*, and compel the attendance of absent members, and do not therefore constitute a duly organized senate capable of transacting any business whatever, save such as is mentioned in the constitution, and as may be incident thereto in the process of organization."

The power conferred upon a less number than a quorum of either

house is, *not to admit new members or pass upon their election, qualification, and return*, but is to adjourn "from day to day," and compel the attendance of "absent members."

A less number than a legal quorum cannot transact business, or authorize the swearing in of *new* members.

The admission of "new members" certainly comes under the head of "transacting business." If it does, then there must be a quorum present, for the constitution declares that a *majority* of the members of each house shall constitute a quorum to "transact business." Suppose, for the sake of illustration, that the legislature of this State had adjourned to meet on the 11th of May, instead of being convened in extraordinary session, and that, by some unforeseen accident, fifty republican members of the house failed to reach the capital on the day fixed for the assembling of the legislature, or that armed sentries prevented them from participating in the exercise of their official duties, and that fifteen or twenty democrats in the house, (who were members,) in the absence of the other fifty members, should recognize fifty of their political friends as members of the house, and swear them in as such, and elect new officers and declare themselves "the house of representatives;" would it be contended that a house thus organized was the true house of representatives? Why not? Would not your answer be that the fifteen or twenty democrats, although members of the house, did not constitute a quorum; that they were members of an organized house, and that less than a quorum could not pass upon the election-returns and qualification of "new members."

Suppose, again, that, during the sitting of the legislature, a new member had been elected to fill a vacancy in the senate, and that for some reason there was not a quorum present on the morning a new member appeared and presented his certificate of election: would less than a quorum of the senate undertaken to have admitted him to a seat? I think not.

Cushing, in his Law and Practice of Legislative Assemblies, (sec. 817,) says: "A message from one house to the other cannot be received by the house to which it is sent, nor can any answer to a message be received by the house by which it is sent unless a quorum is present." Is the receiving a message from the clerk of the house that a bill has passed that branch of the general assembly, any less the "transaction of business," than the admitting, or passing upon the election, qualification, and return of a member? If one comes under the head of "transacting business," does not the other? A departure from the rule, that less than a quorum of a once legally organized house may pass upon the election, return, and qualification of persons claiming seats, establishes a precedent whereby a minority party may change the political complexion of a branch of the general assembly, if at any time during the sessions there should happen to be less than a quorum present.

It may be said that the twenty-seven persons who were admitted to seats in the house of representatives, and the ten persons admitted to seats in the senate, to fill vacancies that had not been declared by either branch of the general assembly, and that did not occur from death or resignation, between the 25th of April (the time the legislature adjourned) and the meeting of the legislature in May of 1874, were legally elected as members thereof. Let us see if this be true. What are the facts in relation to this election? The facts are that at the time the legislature adjourned there was not a single vacancy in either house, and the proclamation of Elisha Baxter shows that but *six* vacancies occurred by either death or resignation during the recess; yet he ordered

elections to be held to fill *forty-four* vacancies. The reason assigned by Elisha Baxter for ordering elections for the election of thirty-eight other members of the legislature is, as you will see by reference to his proclamation, that the members elected in 1872 had either "removed from the district," or had been "*appointed* to office," other than such as a member of the general assembly can hold. The question raised by this state of facts is, "Is the governor authorized, by the laws and constitution of this State, to determine *when* and *whether* a member of the legislature has 'removed from his district,' or vacated his seat by receiving an appointment to office incompatible with the constitution of the State?"

The general rule, as I have already stated, in regard to the construction of a State constitution is, that it is a *limitation* upon the powers of the legislative department, and a *grant* to the executive and judicial departments. This being true, neither the executive nor the judicial departments can exercise any authority or power except such as is clearly granted by the constitution, or conferred by statutory enactments.

Section 14 of Article V, which is headed "Legislative Department," is as follows: "Each house shall choose its own officers, determine the rules of its proceedings, and judge of the election, *qualification*, and return of its own members."

Section 33 of the same article is as follows:

"The general assembly shall regulate by law *by whom*, and in what manner, writs of election shall be issued to fill vacancies which may happen in either branch thereof."

Section 34 of the same article is as follows:

"The general assembly may declare the cases in which any office shall be deemed vacant, and also the manner of filling the vacancy, where no provision is made for that purpose by this constitution."

From these sections it appears, first, that each house is the judge of the election, qualification, and return of its own members; second, that the general assembly is clothed with power to direct by law by whom, and in what manner, writs of election shall be issued to fill vacancies which may happen in either branch thereof; and third, the power to declare the cases in which an office shall be deemed vacant, and the manner of filling the same, except in cases otherwise provided by the constitution.

The constitution nowhere authorizes the *governor*, nor is there any statute, that I have been able to find, that authorizes him to determine *when* an office has become vacant. Therefore, the words "except in the cases otherwise provided by this constitution" have no reference to *his* powers. These clauses clearly indicate that the power of *determining* whether a vacancy exists, either in the general assembly, or in any other department of government, is not vested in the executive of the State, unless conferred on him by statute, which has not been done. Indeed, it may well be doubted whether it could be done.

Section 10 of Article V is as follows:

"Removals of senators and representatives from their respective districts shall be deemed a vacation of their office."

Section 11 of the same article is as follows:

"No person holding any office under the United States or this State, or any county office, excepting postmasters, notaries public, officers of the militia and township officers, shall be eligible to, *or have a seat* in, either branch of the general assembly, and all votes given for any such person shall be void."

I understand this section to mean that all *votes* cast for any candi-

date for election to the general assembly, who holds any office, *at the time of being voted for*, save those excepted, are void. I further understand it to mean that a person elected a member of the general assembly shall not have *a seat* therein, if he holds any office other than those specifically excepted, The language of the constitution is *not* that the "appointment" to one of the prohibited offices shall *create a vacancy*, as it is in the case of "removal from the district," but that no person holding one of the prohibited offices shall have "*a seat* in either branch of the general assembly." The members of the legislature are, in my opinion, a general assembly *only* when they are convened in accordance with law, and *in session*.

The object of prohibiting a member of the general assembly from holding any of the prescribed offices, obviously was to guard against him holding any position that might influence his action as a legislator. The duties of a legislator are not continuous, and if at the time he is called upon to act as such, he is not of the proscribed class, I cannot see any objections to his holding his *seat*, notwithstanding he may have been "appointed to office." But, be this as it may, one thing is very clear; and that is, it is no part of the duties of the *governor* to determine the question, and order an election to fill vacancies where none have been declared. We have already seen that the general assembly is clothed with the *exclusive* power to regulate by *whom* and in what manner writs of election shall be issued to fill vacancies in either branch of the legislature. The conference of power to designate by *whom* the writ of election shall be issued, shows, conclusively, that the issuing of writs of election is not a duty devolving, by the constitution, on the chief executive of the State. The legislature, under the power conferred, could have designated the secretary of state, or any other person, to have performed this duty, just as easily as it designated the governor.

This shows that the duty of issuing writs of election, to fill vacancies, is not a *prerogative* of the governor, but a plain, simple, *statutory* duty, in the execution of which he has no more discretion than the sheriff of a county would have had, had he been charged with the duty.

Now let us see what the statute says. Section 1, chapter 80, of Gould's Digest, p. 567, is as folows:

"When any member elected to either house of the general assembly shall resign *in the recess thereof*, he shall address and transmit his resignation in writing *to the governor*, and when any such member shall resign, *during any session*, he shall address his resignation to the *presiding officer* of the house *of which he is a member*, which resignation shall be entered on the journals; in which case, and in all cases of vacancy happening *or being declared during any session of the general assembly*, by death, expulsion, or otherwise, the presiding officer of the house in which such vacancy shall happen shall immediately notify the governor thereof, who shall *immediately* issue a writ of election to supply such vacancy."

Section 2 of said act is as follows: "Whenever the governor shall receive any resignation, *or notice of vacancy*, or when he shall be satisfied of the death of any member of either house, *during the recess* thereof, he shall, without delay, issue a writ of election to supply such vacancy.

Three things are observable in the section quoted: first, that the resignations made *in vacation* are to be addressed to the *governor*; second, that the resignations made *during the session*, are to be made to the presiding officer of the house of which the person is a member; and third, that these sections contemplate, except in case of death or resig-

nation *during the recess of the general assembly*, that each house, *when the legislature is in session*, shall declare the cases in *which vacancies exist*, whether they arise from "death, resignation, or otherwise." There are only *two* cases where the governor is authorized to issue a writ of election to fill a vacancy on his own motion. One is where a vacancy occurs by resignation *during a recess of the legislature*; the other is when he shall be satisfied of the death of a member *during a recess thereof*. It is true that the second section authorizes him to issue a writ of election on "notice of vacancy," but the "notice of vacancy" there referred to relates to the "notice of vacancy" referred to in the first section, and which the presiding officers of each house may have communicated to him. Baxter issued writs of election in two cases to fill vacancies occasioned by "removal from the district," and forty-two writs of election to fill vacancies arising from members of the general assembly having been "appointed to offices" other than those the constitution permits a member of the legislature to hold; he did this *on his own motion*, and this was done without receiving notice of the existence of any vacancies in either house "*from the presiding officers thereof*." This clearly is beyond the scope of his authority and the statutes. It would be a dangerous power to place in the hands of any man, especially the chief executive officer of the State, to *determine or declare vacancies* in the general assembly.

Mere "*appointment* to office" is not a ground of *disqualification* to sit as a member of the general assembly. It is the *holding* a forbidden office, that works disqualification, and the question of whether the office *is being held*, (not whether a member received an "appointment,") is a matter for the determination of the house of which he is a member, and not for the governor. Upon this question, it being a *legislative* and not a *judicial* determination, there are no adjudicated cases to be found in the books of the profession. The only two cases that I have seen that have any bearing on the question, are to be found in 17 Serg. and Rawle, (Pa.,) 219, and Brightley's Election Cases, 646.

The only use which can be made of these cases is that they are precedents to show that the question of holding an office inhibited by the constitution, is a matter for the determination of the house *of which he is a member*, and that until *it* has adjudicated and declared a vacancy, *that none exists*, and if none exists, it must be patent to all, that the governor, under the law regulating the issuing of writs of election, is not authorized to order elections to fill vacancies *that may or may not be declared*. But in order to remove all doubts on this subject, let us put the question so there can no longer be any dodging it, and this may be done by asking if the power of determining whether a vacancy existed *could be conferred* upon the governor, *even by an act of the legislature?* That it is not conferred by the constitution we have seen, because the constitution says, "Each house shall be the judge of the election, qualification, and return of its own members." That it is not *ex necessitate* an executive duty, we have also seen; that the *holding* of an inhibited office is a thing that goes to the *disqualification* of a member the constitution declares. Under this state of facts, let us see if the legislature could confer the power on a governor, even if it were so disposed, to determine whether a member had vacated his office by being "appointed" to another. I say it could not.

By the constitution the *sole* power of judging of the election, qualification, and return of a member, is conferred on "each house." The rule in relation to a conference of power is, that it cannot be delegated unless the authority delegating the power has so declared. The

power to pass laws, or the power to allow a statute to become a law, subject to the approval of the people, has time and time again been decided could not be done. The authority to issue writs of election may be delegated because the constitution so declares. What is the declaration that a vacancy exists in either house, but the declaration and passing upon the *disqualification of a member?* Is not the determination that a member of the legislature has accepted an office, that disqualifies him, a passing upon his *disqualifications?* Does not the constitution say that "each house" must do this? If it does, what *implication* does it raise? Would not the exercise of such a power be an exercise of a power lodged with each house of the legislative department? Does not the constitution say that "no person belonging to one department shall exercise the power properly belonging to another?" Does the governor belong to the legislative department? I do not say that the acceptance of a prohibited office does not disqualify one, who had been a member of the legislature, from thereafter acting as a member of the general assembly. This, I say, I do not deny. But I do deny that the governor was, is, or can be, clothed with power to declare a vacancy in either branch of the general assembly and order an election to fill the same.

The fact of disqualification may be known to every man, woman, and child in the State, but until it has been *declared* by a tribunal that is authorized to ascertain and declare the fact, it does not *exist.*

A sheriff may have seen a man commit a most atrocious and wanton murder. He may be perfectly confident that when the court meets a jury would convict him, and that the judge would sentence him to be hanged, but all this would not warrant the sheriff in executing the murderer until his guilt had been declared in the manner prescribed by law. And so with the governor: he may have been satisfied in his own mind that the persons whose seats he declared vacant had accepted offices that would disqualify them from serving as members of the general assembly, but until this fact was *determined and declared* by the only tribunal authorized to make that declaration, he had no right or power to order an election. It may have been done with the best of motives, and with the belief that he had the power; but neither *motives* nor *belief* changes the *fact that he did not have the power* to issue writs of election to fill *anticipated* instead of *real* vacancies.

The governor does not even pretend that any one of the persons ever *accepted* or entered upon the discharge of the duties of the office to which he says they were "appointed." If the governor can disqualify a member of the general assembly from acting as such, by mere "appointment" to office, you have placed it within his power to get rid of his political enemies in the legislature at all times. The question, not only of having *received* an "appointment," but of having *accepted* it, as well as having performed the other prerequisites necessary to clothe one with the insignia of office, are questions that cannot be delegated to any other department of government. An attempt was made in the case of *The People* v. *Mahaney*, 13 Mich., to get the supreme court of Michigan to declare a law unconstitutional because three members of the legislature whose votes were necessary to the requisite majority, in point of fact, were not entitled to seats. In response to the demand, Judge Cooley said:

"The general judicial power of the State upon the courts and officers specified is conferred by the constitution, and there are other powers of a judicial nature, which, by the same instrument, are expressly conferred upon other bodies or officers, and among them is the power to judge of the election, qualification, and returns of members of the legis-

lature. The terms employed clearly show that each house, in deciding, acts in a judicial capacity, and there is no clause in the constitution which empowers this or any other court to review their action. * * The question of the legal election of a member is usually a question compounded of law and fact, and the house must necessarily pass upon both. * * * It is sufficient for us to say that the constitution has not conferred upon us this jurisdiction; we leave it where it has been left by the fundamental law of the State."

It appears perfectly plain to me that if a *court* could not pass upon the election, returns, and qualifications of a member of the legislature, that a *governor* cannot. I expect our friends on the other side will contend that a body of men calling themselves a legislature, can pass upon their own qualifications, and that no other tribunal can review their finding. So far as *State* authority is concerned, the statement is absolutely true; but so far as *United States* authority is concerned, it is not true. It may be asked if Congress shall hear and determine election contests between members of the legislature of a State? My answer is, that Congress has no such power; but it has the power to determine which of two bodies *is* the legislature of a State, or whether a body of men acting as such are what they pretend to be. Without this power, how is Congress to act in the event a legislature should ask the guarantee given by section four of article four of the Constitution of the United States, to protect the State against domestic violence?

But a short time since there were two bodies of men in the State of Alabama, each claiming to be the general assembly of that State. Suppose one of them had appealed for aid to suppress an insurrection against the State government of Alabama? Will it be contended that in such case Congress could not, before taking action on the application to enforce the guarantee, determine for its own guidance whether the persons claiming to be elected, and claiming to constitute the general assembly of that State, were in fact duly and legally chosen by the people, or whether they were mere pretenders?

Why, sirs, a mere statement of the question eliminates its absurdity. The guarantee of the constitution can only be invoked by the legislature of a State, or by its executive when the legislature cannot be convened; and to deny that Congress cannot determine in such a case, which of two bodies claiming to be a legislature, or whether a body of men claiming to be a legislature are such; or which of two persons claiming to be the governor of the State, is in fact what they represent themselves to be, is to render nugatory a provision of the Constitution of the United States.

The evidence in this case shows clearly and distinctly that there was not a quorum of the legislature present, and that there was a legal quorum in existence at the time of the pretended organization. The organization of the legislature is not a thing the law contemplates should take place every time it is convened. Its members are elected for two and four years, and when once organized that organization stands for two years. Now, the legislature that elected Baxter attempted to convene in extraordinary session; was an organized body at the date of its adjournment. He called it together, and because some of the members did not suit his purposes he kept them out at the point of the bayonet. Because he kept them out he could not get a quorum; but a legislature was necessary, and a legislature he must have. If the absent members were admitted to seats they would not do his bidding. Here was an emergency, and a man was found equal to it. In looking over the election-law he found the following section:

"SEC. 54 It shall be the duty of the secretary of state on the *first* day of each *regular session* of the general assembly to lay before each house a list of the members elected agreeably to the returns."

Under the law of Arkansas each house of the general assembly is organized upon the roll furnished by the secretary of state, and the members have no other credentials. The authority conferred by the section cited, as will be observed, is conferred on the secretary of state, and *on the first day of the regular session.* This is no authority to any one to make out a roll at the beginning of an *extraordinary session.* On the roll submitted were the names of forty persons, and *twenty-six* of them, in the house of representatives, voted for the bill calling a constitutional convention. Attached to this roll is the following certificate:

"*To the speaker of the house of representatives:*

"I herewith transmit a true and correct list of the members of the legislature elected to the *lower* house of the legislature at a special election held on the 4th of November, 1873, as appears *from the returns on file in my office.*

"JAMES M. JOHNSON,
"*Secretary of State.*
"By A. H. GARLAND,
"*Deputy Secretary of State.*"

You will recollect that I called this man to the witness-stand and exhibited to him a copy of this paper and asked him if he furnished the list and certificate to the house of representatives. His reply was that he did. I then asked him if, at the time of making that certificate and furnishing the roll, he was in possession of *any* of the records of the office of secretary of state. His answer was, "None at all." I then asked him if he had the returns from the election officers. To this question he responded by saying, "No, sir; I had no records at all in relation to the election of these men."

Without a legislature a constitutional convention could not be called. All that was necessary was to make a *roll* and send it to the fifteen democrats inside of Baxter's military lines, and the work was accomplished.

Without ever having seen an election-return, Garland made out a roll on which he says forty persons were elected as members of the legislature, according *to the returns on file in his office,* and when interrogated about returns he says he did not have any. By the act described, Garland *created a legislature* and paved his way to the gubernatorial chair, where he sits to-day. Who will say after this that virtue hath not its own reward?

Before leaving this subject I desire to call your attention to one fact in connection with the evidence, and that is that there is no proof that any one of the persons that Elisha Baxter *appointed* to office ever *accepted* the same or entered upon the discharge of the duties thereof. Under the provisions of the Constitution of the United States the governor of the State is authorized to issue writs of election to fill vacancies happening in the House of Representatives. Suppose that during the term of Andrew Johnson he had *appointed* all the leading republicans that were obnoxious to him to some office incompatible with that of a member of the House, and suppose the governor of the State, upon public rumor of such an appointment, had ordered an election to fill a supposed vacancy, when the person *appointed* had neither *accepted* the same nor entered upon the discharge of the duties of the office to which he was

appointed, and suppose the person elected to fill the supposed vacancy, together with others similarly chosen, at the time fixed for the meeting of Congress should have come here, and Andrew Johnson had surrounded the Capitol with the Army of the United States, and would not let any of the members of Congress, save such as were his political friends, within the Capitol building, and that the persons elected under the circumstances I have indicated had met with a few members of the old Congress and organized a *new* House of Representatives and a *new* Senate, with *new* officers from the highest to the lowest, and that the Congress thus constituted should pass a bill submitting the question of calling a convention of the people to frame a new Constitution, by a direct vote of the people of the United States, and in the same bill provide that the officers to canvass the vote should be chosen by the revolutionary body, and that the officers thus chosen should have the appointment of every judge of election and election officer throughout the United States, for the holding and declaring the result of said election, and that Andrew Johnson, in aid of that revolutionary movement, placed the District of Columbia under martial law, and kept it there during said election and the session of the convention, and that the Congress of his own creation had passed a law first providing that all officers, upon the passage of articles of impeachment by the House, should be suspended from the exercise of their functions, and authorizing the President to appoint other persons to act during the period of suspension; and that within a day or two thereafter every officer obnoxious to his administration, not only in the executive, but in the judicial departments, should be impeached by the House for an act that, under no state of case, was an impeachable offense; and when the chairman of the committee reporting the articles stated publicly, on the floor of the House, before the vote was taken, that he had not examined a single witness in support of any one of the charges, and that Congress, fearing even the judges of Johnson's own appointment, should pass a law inhibiting the opening of any court of the United States for a period of seven months, for the purpose of preventing any adjudication or determination of the legality and validity of the proceedings which led to the calling of the convention; and that after the election the commissioners should declare that a majority of the votes were cast for a convention, and that certain persons were elected delegates thereto, and the delegates should frame a constitution, and in the ordinance submitting it to a vote of the people should provide for three commissioners of their own selection to canvass the vote and declare the result on its adoption, and who were elected to offices thereunder, and conferring on these three commissioners the selection of every election-officer, and at the same time making no provision for a contest of the vote, nor a tribunal to hear and determine the legality thereof, and that these commissioners should declare the same ratified, and that Andrew Johnson, on the declaration of who was elected President, should have turned the office over to Jefferson Davis or Robert Toombs; the question I desire to ask is, what words you would find to express your indignation at such violence and disregard of law?

All that is here supposed in this case has actually happened in Arkansas, and you will be asked to sustain it and thereby make a precedent, declaring that such action is legal, or that it is revolutionary.

In examining the make-up of the legislature, you have a right to go into the details of its election. The resolution under which this committee is appointed confers full and ample authority upon you to make the inquiry.

"The validity of an election depends upon its being held and conducted at the proper *time* and *place*, and *in the manner* provided by law." *Satterlee v. San Francisco*, (23 Cal., 329.)

I shall not trespass upon your time in citing authorities, or in adducing arguments, to convince you that an election held to fill a *vacancy* when no vacancy exists, confers no authority upon a person elected at such an election. The books of the profession are full of cases upon this point, and are no doubt familiar to all of you.

I think I have already shown you that the governor of Arkansas is not clothed with the power, under the constitution and laws of Arkansas, to determine *when* a vacancy exists in the legislature, other than those happening by death or resignation during the recess of the same. But suppose for argument's sake that I am wrong in this, we still have to ascertain whether the election was held at the *time*, *manner*, and *place* provided by law. Upon this subject there can be no diversity of opinion. The *ballot* in the American form of government is the instrument by which the voice of the people is heard and ascertained. It is hedged around with certain safeguards, and around it is thrown the protection of the law. We hear men talk of the "will of the people," as though the clamor of the mob and the cry of revolutionists was entitled to respect. The people of this country are a *corporate* people, and they can only speak, *legally*, at the time and in the manner agreed upon.

It appears from the evidence that at the time and in the manner prescribed by law, previous to the November election of 1872, registrars were appointed, and that said registrars made a registration of the legal electors of said State of Arkansas, and that neither said board, nor the persons composing the same, have died or resigned, but are yet residents and citizens of said State, except in a few isolated instances, and these occurred before the adjournment of the Senate on the 25th of April, 1873; that afterwards, to wit, on the 18th day of September, 1873, the *governor* of said State ordered a registration of the legal electors of the State, and appointed a new board of registration, composed of different persons than those who constituted the registration board of 1872; that the persons so appointed by the *governor* in 1873, made a registration of the electors of said State, and that at the election held in November of 1873, to fill vacancies in the general assembly, the persons registered as electors by the board of registration appointed by the *governor* in 1873 were allowed to vote, and that the election was held by persons appointed judges of election by the board so appointed by the governor in the year last named.

Upon this state of facts, the question is, "Whether the appointment of registrars made by Baxter in 1873 was authorized by law?"

Section one of the registration act (Sess. Acts of 1st sess., 1868) reads as follows:

"That on or before the first day of August, 1868, *and every two years thereafter*, the governor shall, *by and with the advice and consent of the senate*, appoint three loyal, competent, and discreet citizens in each county, who shall have resided at least six months in the county next preceding their appointment; said persons to be styled and called a board of registration."

The second section of said act reads as follows:

"The governor shall fill any *vacancy* occurring in any of the appointments *made by him*, and may, in his discretion, remove any one *so appointed by him* for incompetency or other sufficient cause."

The power of removal conferred by the second section of the registra-

tion act is limited to persons that the governor *may have appointed to fill a vacancy.*

The language of the section is that he may "remove any one so appointed by *him.*"

The only case where the absolute power of appointment is given to the governor, *alone*, is to fill a vacancy The appointment of registrars, in the first instance, is by the governor, *by and with the advice and consent of the senate.* The power of *removal* conferred by the second section is not broad enough, nor do I think it was the design of the same, to authorize the removal of persons that had been appointed "by and with the consent of the senate."

The twenty-third section of the act authorizes the governor, "where, for any reason, a *proper registration* has not been made previous to any general election, to cause a new registration to be made for the purpose of any municipal, State, or county election." This section contains no conference of power to *remove* any one. The power conferred is to cause a "new registration" to be made.

The registrars appointed in 1872 were, under the law, appointed for two years, and, if they did not resign or abandon the office, the second section confers no power to remove any one save such as the governor had appointed *to fill vacancies.* The appointment of other persons to make the registration amounted to a removal of the old registrars *if* the act was authorized by law; if it was not, it was *a usurpation of power*, and all acts had, done, and performed thereunder are absolutely void. The power to *fill* a *vacancy* does not include the power to *create* a vacancy. In the case of *Keenan* v. *Perry*, (24 Texas, 257,) it was held that "where the power of appointment is *exclusively* vested in any tribunal or department of government, and the office is held *at the discretion of the tribunal*, the mere appointment of a successor is, *per se*, a *removal* of the prior incumbent." The rule here laid down is correct, if *the power to remove* was contained in the act authorizing the appointment, as was the fact in the case cited.

In the case of *Field* v. *The People*, (12 Scam., 109,) it was held that, "where the power of appointment was *conjointly* vested in the *governor and senate*, that the governor *alone* could not remove. In the case of *Dubuc* v. *Voss*, (19 La. An.,) the court said, "The power to *remove* is not incident to the power to *appoint.*" The power of the governor even to fill vacancies, in my opinion, is restricted. In the case of *The People* v. *Ewing*, (Breese, 68,) it was held that "the governor cannot make an appointment in the recess of the general assembly, unless the vacancy occurred *since* the adjournment of that body."

This, although we have no constitutional provision or statute on the subject, I believe, from analogy and practice, to be the law of Arkansas. If it is, Baxter was restricted, in the appointment of registrars, to the filling of such vacancies as occurred between the 25th of April, 1873, and the day of election, and these appointments would hold good only until the next meeting of the legislature, which was in May of 1874, unless confirmed by the senate.

If I am right in this view of the subject, it follows that no legal election could be held at the November election of 1873, because the registration was not made in accordance with law. But behind this is another question, and it is,

"Whether the governor was authorized by law to order a registration in 1873 for the registration of the *class of persons* referred to in his proclamation?"

The power to order a registration is derived from the statute. A

statutory power must be strictly pursued by executive officers. The twenty-third section of the registration act delares that "if for any reason *a proper registration* has not been made previous *to any general election*, the governor, when notified of the fact, shall cause a new registration to be made." It is a well-settled principle of the law that where a special and exclusive authority is delegated to a tribunal or officer of the government, and no mode of revising his action or decision by appeal or otherwise is provided by law, his action and determination are final and conclusive of the matter submitted to his decision. *Keenan* v. *Perry*, 24 Texas, 253; *Dubuc* v. *Boss*, 19 La. An., 211; *Martin* v. *Mott*, Wheat., 29.

Under this rule all question as to *notice*, and the sufficiency of the *reasons*, is wholly within the discretion of the governor, subject to such limitations only as the law may surround him with. The ground on which, or rather the reason he assigns for ordering a new registration, is, that "a registration of the legal voters has not been made since the adoption and ratification of the amendment to the constitution known as Article VIII." I have said that the authority to order a new registration was a statutory power, and that such power must be pursued strictly by executive officers. The power to order a new registration depends solely upon whether "a proper registration" was made "previous to a general election."

If a proper registration (and by this is meant such a registration as should have been made *in the first instance*) was made previous to a "general election," that registration must stand for two years. If there was not, then the governor may order a new one. The governor does not claim that a "proper registration" was not made of *all* the legal electors of the State, of the counties named in his proclamation, *previous* to the "general election" held in November of 1872.

His proclamation says "a registration of the legal electors of the State has not been made *since* the adoption and ratification of the amendment to the constitution known as Article VIII."

The question then is, Does the twenty-third section of the registration act authorize the governor to order a registration, to place the names of persons on the registration-books *who did not possess the qualification of electors* at the *time* the registration was made "previous to the general election" in 1872?

I think not. The registration, when once made, is expected to stand for two years. It frequently happens that many persons who are not possessed of the requisite qualifications of an elector at the time the registration is being made, on account of want of residence and non-age, outgrow, within a very short time after the election, the disqualifications that existed when the law fixed the time for ascertaining the qualifications of electors. If, after they have outgrown their disabilities, a special election should be ordered, these persons could not vote, because the law makes no provision by which their names may be placed on the registration-books. *Registration*, under the constitution and laws of this State, is a *prerequisite* to voting. It may be a hardship on those persons who may have come into the possession of the requisite qualifications since the registration to deny them the privilege of electors at special elections being held after their disabilities no longer exist. If it is, it is one the *law* imposes, and the remedy is by legislation. Would the governor have the power to order a registration preceding a special election for the purpose of giving the persons who had become of age since the "previous registration" an opportunity to vote? Would he have the power to order a registration to

give the persons an opportunity to vote at a special election who, by residence, had acquired the right to be electors, but who did not possess this right *at the time* the general election was to be held? I think not!

An elector, not only at a general but at a special election, must have his rights ascertained immediately preceding a general election.

The fact that a considerable number of persons, by the adoption of the amendment to the constitution known as Article VIII, became entitled to the ballot who were not entitled to it *prior to the November election of* 1872, does not go to establish the fact that "a proper registration" was not made preceding the general election." In fact, the proclamation of the governor clearly and distinctly shows that the object in making the registration was to register a class of persons to vote at a special election *that were not entitled to the use of the ballot at the time* the registration was made in 1872.

The law does not authorize any such registration. The governor had a right to order a new registration without assigning any cause or reason therefor; but in the making of that registration the persons registered would have been examined, or should have been examined, with a view to ascertaining whether the persons applying therefor were possessed of the proper qualifications, *not* at the time the "*new registration*" was *being made*, but whether the persons applying had the proper qualifications of electors *at the time* "a proper registration" *should have been made, to wit, before the general election.*

No one can examine the registration law of Arkansas and find any authority whatever for the placing of any name on the registration-book that did not possess the qualifications of an elector *at the time* the registration was being made, previous to "a" general election, nor can he find any authority for allowing a person to vote *at a special election* that did not possess all the qualifications of an elector *at the general election immediately preceding it.* The right to vote at a *special election*, under the laws of this State, depends solely upon the right to vote at a *general election.*

Under a statute in Missouri, the law requires the registration-book to be opened fifteen days before a special election, for the purpose of adding the names of such persons to the registry "as have become qualified voters after the closing of the registration made preceding the general election." Breckenridge, who had been a Federal soldier during the war, and who possessed all the qualifications of an elector at the time the registration was made preceding the general election, and who was regularly registered at said registration, but the same having been declared illegal, and the entire registration of the county having been set aside, he applied to be registered before a "special election." In disposing of the application for mandamus, the supreme court of Missouri said, (*State* v. *Cook*, 41 Mo., 597:) "It seems that the law makes no provision, in case where the books are destroyed, or they have been rendered ineffective for any reason, for making the registration anew. No new registration can be made until the next biennial election. There is undoubtedly a palpable defect in the law, a clear *casus omissus;* but this court cannot be appealed to to amend and perfect laws by judicial legislation.

"There is no provision made for registering any persons except such as have qualified *since* the closing of the last general registry. A person therefore who was duly entitled to registration, and failed from any cause to be registered, cannot avail himself of the privilege when the lists are being completed in view of a special election."

It is a defect in the law, that persons in this State who may have become possessed of the requisite qualifications of an elector *since* the registration was made, cannot participate in the special elections happening after they are qualified; but this defect cannot be remedied by the *governor* any more than it can by the courts. It is clear to my mind that no person can be permitted to register or vote at any election, no matter how many registrations may be ordered, that did not possess the requisite qualifications of an elector *at the time "a proper registration" should have been made.*

The next question for consideration is whether the boards of registration appointed by Elisha Baxter, in 1873, were clothed with power to remove the old judges of election and appoint others in their places; and whether an election held by judges appointed by registrars whose own appointments were void could hold a legal election to fill vacancies that had not been declared to exist, by the only power that could rightfully determine the question.

I have already stated that Baxter had no authority under the laws of this State to appoint registrars, save to fill such vacancies as occurred since the 25th of April, 1873, the time of the adjournment of the legislature. If vacancies existed prior to that date, it was his duty under the law to have sent the nominations to the senate. In those counties where there was a board of registration in existence, he had no power to appoint another, and if the boards thus illegally appointed attempted to or did appoint persons as judges of election in the different precincts of their respective counties, the act was an absolute nullity. The first section of the election act is as follows: (Sess. Acts, first sess. 1868, p. 315.)

"All general elections for the election of any executive or judicial officers, *members of the general assembly*, &c., shall be held on the Tuesday next after the first Monday in November, and shall be biennial, commencing at the general election in 1868."

Section 4 of the same act is as follows:

"The board of registration for each county, immediately before such election, (the general election,) shall appoint three discreet persons in each election district, having the qualifications of electors, to act as judges of election within the election district," &c.

Section 6 of said act is as follows:

"The judges of election appointed as aforesaid shall continue to be the judges of all elections within their respective districts until the next general election."

The time of appointing the judges of election is *immediately before* "such election." The words "such election" refer to the general election spoken of in the first section, *and not to a special election to fill vacancies.* Once appointed, the law says they shall be judges of *all* elections within their respective districts until the next general election, *not until the next special election.* It is a well-established principle of law, and so generally understood that it is scarcely necessary to cite authorities in support of the proposition, that where a power of appointment is conferred on a board and it is once exercised, at the time designated by law, that the board cannot revoke its action after once having made an appointment. It might be conceded, for the sake of argument, that Governor Baxter had the power to appoint new boards of registration, but even this new board could not exercise the power of appointing judges of election to hold the election in 1873, because the law says the appointment shall be made immediately preceding a *general election*, and that, when so appointed, they "shall be the judges of *all* elections

held within their respective districts until the next general election." The election in 1873 was not a *general* election, it was a *special* election, and there is no law authorizing the board of registration to appoint judges of election at any other time than "immediately before a general election." This appointment having been made, the board of registration, as an appointing board, was *functus officio*. A failure on the part of the board of registration that was appointed in 1872 to appoint judges of election, would not have authorized the board appointed in 1873 to have appointed others. The law itself says *how* the judges of election shall be chosen in the event of failure of the board of registration to appoint at the time designated by law. It is as follows:

"Section 7. If * * * the board of registration fails to appoint judges of election, or those appointed fail to act, * * * the voters when assembled may appoint the judges."

The law nowhere provides for the removal of a judge of election, but does provide how another shall be selected, if he fails to act. It may be admitted that the persons making the registration in 1873 were all legally appointed; and what follows? Why, this: that they could not exercise other powers *than belonged to the board of registration*. Suppose there had been no change in the board, and that the registration made in 1873 had been made by the registrars appointed in 1872, would the board of registration have been empowered to appoint new judges of election? I answer, no, emphatically; for the law says, if the appointment is made by the board, that it must be made "*before* the general election." and if not done then, that the electors, *when assembled at the polls*, shall make the appointment.

It may be said that these things are technicalities. It is not true that they are *technicalities*: they are departures from law and evidence of *lawlessness*. These acts evidence a total disregard of the law; they not only evidence this, but the proof shows conclusively that he who was sworn to take care that the laws were faithfully executed, was the first to violate them.

For the time being I will now leave these questions, and pass to one where the answer of "technicality" cannot be raised. Let us admit, for the argument, that there was no question as to the legality of the legislature passing the act calling a constitutional convention; let us admit that the governor had the right to remove the registrars and appoint others in their places; let us admit that the registrars thus appointed had a perfect right to register a class that were not entitled to registration under the law, and that they had a right to remove the old judges and appoint the new; let us admit that every step in the election and elsewhere was regular, in every respect, up to the time the legislature passed the act calling a convention, and that the legislature was clothed with power to provide for calling a constitutional convention. These things admitted, we are still confronted with another question, that will not down at the bidding of any man.

The question now arising is:

"What effect did the *marking of ballots* have, if any, on the election, to determine whether a constitutional convention should be called, and upon the election of delegates, under the peculiar provisions of our constitution?"

In construing the constitution of a State, the object ought to be to ascertain the intent, not only of the framers, but of the people, when it was adopted.

Intent may as often be inferred and discovered by examining the amendments made from time to time, as from any other source. The

constitutional convention of 1868 passed an *ordinance* and appended it to the constitution, the fourth section of which is as follows:

"The secrecy of the ballot shall be preserved inviolate. No judge, inspector, or other election officer shall *mark* or deface, or *permit to be marked* or defaced, any ballot cast (at an election) at which he is acting, whereby may be ascertained the manner in which any elector voted."

This section, I say, was appended to the constitution of 1868, but is found in an *ordinance* of the convention. Many persons doubted whether this section of an *ordinance* was of the same force and effect as *a provision of the constitution*. Under the constitution of 1836, and that of 1851, elections were not necessarily by ballot, but *viva voce*. The eighth section of Article VI of the constitution of 1836 is as follows:

"All general elections shall be *viva voce*, until otherwise directed by law."

This same provision was incorporated in the constitution of 1864, *verbatim et literatim*. In 1846 (Gould's Digest, p. 470) the legislature, under the power conferred by the constitution, changed the mode of voting from that of *viva voce* to that of *ballot*. The section alluded to is as follows:

"SECTION 36. The mode of voting at all general and other elections authorized by the constitution and laws of this State shall be by *ballot*."

The forty-sixth section of the election law is as follows:

"It shall be the duty of the clerks of all elections to register the names of each and all electors in the order in which they may present their ticket, placing opposite each name its appropriate number, and indorse on the ticket of such elector *the corresponding number*."

Ordinarily the word "ballot" implies *secrecy*, but it may well be doubted whether, under the constitution of 1836 and the law passed thereunder, it did.

The fact that voting prior to the act of 1846 was *viva voce*, discloses the fact that it was not against public policy to know how every man voted, and it may further be doubted whether the legislature, under the circumstances stated, was bound to attach any *secrecy* to the ballot. I think it was wholly within the discretion of the legislature at that time to determine whether the ballot should be clothed with *secrecy*, or whether it should not.

But be this as it may, its determination is not necessary to a solution of the question asked.

I have mentioned these facts to show the manner of voting prior to 1868, and the ordinance of the convention to show an intention to depart from the system then in vogue. The declaration that the secrecy of the ballot should be preserved inviolate, and that no judge, inspector, or other elective officer should mark or deface, or permit to be marked or defaced, any ballot cast at which he is acting, whereby may be ascertained the manner in which any elector voted, discloses unmistakably an intent that a ballot *should not be marked or defaced*, in a manner that would enable the judges of election, or any other person, to ascertain how an elector voted. I have said there were some doubts as to whether the *ordinance* referred to had the force and effect of a constitutional provision.

In an amendment made to the constitution, that was ratified in March of 1873, the following provision is found:

SEC. 3, Art. 8. "In all elections by the people, the electors shall vote by ballot. The *secrecy* of the ballot shall be preserved inviolate, and the general assembly shall provide suitable laws for that purpose."

If, after declaring that all elections should be by "ballot," the fram-

ers of the constitution had stopped, in view of the doubt cast on the ordinance, and the custom prevailing anterior to 1868, it might with some degree of plausibility be contended that the ballot referred to was the ballot in use *before* that time; but the words, "the *secrecy* of the ballot shall be preserved inviolate," following the word "ballot," in the preceding sentence, shows beyond all question that the veil of secrecy should never be removed therefrom for any purpose.

I desire to call your attention specifically to the following section of the act providing for a convention to frame a new constitution:

"SECTION 11. As the electors present themselves at the polls to vote, the judges shall pass upon their qualifications, whereupon the clerks of election shall register their names on the poll-books, if qualified, and such registration by said clerks shall be a sufficient registration in conformity to the constitution of this State, and then their votes shall be taken: *Provided*, no person shall vote outside or elsewhere than in the township, ward, or precinct in which he resides. The electors shall be numbered and the number of each elector marked on his ballot, by one of the judges, when deposited."

The question now arises, does the marking of a ballot deprive it of the sanctity of secrecy thrown around it by the constitution; and if so, what is the result?

Chief-Justice Denio, in the case of *People* v. *Pease*, (27 N. Y., 45,) uses the following language:

"I have already alluded to the policy of the law providing for a secret ballot. The right to vote in this manner has usually been considered an important and valuable safeguard of the independence of the humble citizen against the influence which wealth and station may be supposed to exercise. This object would be accomplished but very imperfectly, if the privacy supposed to be secured was limited to the moment of depositing the ballot. The spirit of the system requires that the elector should be secured *then, and at all times thereafter*, against reproach or animadversion, or any other prejudice, on account of having voted according to his own unbiased judgment; and *that* security is made to consist in shutting up within the privacy of his own mind all knowledge of the manner in which he has bestowed his suffrage."

Judge Cooley, in his work on "Constitutional Limitations," (————) says:

"The mode of voting in this country at all general elections is almost universally by ballot. The distinguishing feature of this mode of voting is, that every voter is thus enabled to secure and preserve the most complete and inviolable secrecy in regard to the persons for whom he votes, and thus escape the influences which, under the system of oral suffrages, may be brought to bear upon him, with a view to overbear and intimidate, and thus prevent the real expression of public sentiment."

I have quoted these authorities for the purpose of showing the *object* of the secret ballot, and the importance it is to the citizen at a time when partisan prejudice may be running at high tide. There are many instances where the law was silent as to whether the ballot was to be secret or not, where the courts have decided that an elector could not be compelled to disclose how or for whom he voted. (*People* v. *Pease*, 27 N. Y., 81; *People* v. *Cicott*, 16 Mich., 283.)

The thirteenth section of the constitution of the State of Indiana (Art. 2) is as follows:

"All elections by the people shall be by ballot."

Here, it will be seen, the kind of ballot, whether secret or otherwise, is not stated as it is in the constitution of this State.

Under the constitution of Indiana the legislature passed an election law, and among its provisions is this section:

"It shall be the duty of the inspector of any election held in this State, on receiving the ballot of any voter, to have the same numbered with figures on the outside or back thereof, to correspond with the number placed opposite the name of each voter on the poll-lists kept by the clerks of said election."

It will be seen that this section is substantially the same as that passed at the extraordinary session of the general assembly in May last, and which is in the act providing for a submission of the question to the people of the expediency of calling a constitutional convention. At an election held in that State in October of 1870, Williams demanded of Stein, the inspector of election, that his ballot should not be numbered as directed by statute. Stein received the ballot and numbered it as he did all others. Thereupon Williams brought suit against Stein for "being damaged in his constitutional privileges and franchises." The question thus presented (a demurrer being filed) involved the constitutionality of the act. The demurrer was overruled, exception taken, and Stein refusing to answer over, the cause was submitted to the court for trial. Judgment was rendered for the plaintiff, and the cause was appealed to the supreme court of the State. The only error assigned was the overruling of the demurrer. In disposing of the case, as thus presented, the court said, (38 Ind., 89:)

"I am not unmindful of the rule that all doubts are to be solved in favor of the constitutionality of legislative enactments. This rule is well established, and is founded in the highest wisdom. But my convictions are clear that our constitution was intended to, and does, secure the absolute secrecy of the ballot, and that the act in question, which directs the *numbering of tickets* to correspond with the numbers opposite the names of the electors on the poll-lists, is in palpable conflict, not only with the spirit but with the substance of the constitutional provision. This act was intended to, and does clearly, identify every man's ticket, and renders it easy to ascertain exactly how any particular person voted.

"That secrecy which is esteemed by all authority to be essential to the free exercise of suffrage, is as much violated by this law as it it had declared that the election should be *viva voce*. If the constitution secures to the voter in popular elections the protection and immunity of secrecy, there can be no doubt that section two of the act of 1869, which authorized the inspector to number ballots, is in conflict with it, and void."

Tested by the rule laid down in the case of *Williams v. Stein*, the eleventh section of the act, providing for a constitutional convention, is void. But, it may be said that the decision in the case of Williams *v.* Stein does not prove or establish the fact that the election held was a nullity, or that it was void. It is true the court did not decide that the persons voted for at that election were not entitled to their *offices*. This question was not before the court. But it did decide that a law requiring ballots to be numbered was unconstitutional. This brings us to a consideration of the question whether an *election* held under an unconstitutional law, confers the same power it would if the act were valid, and whether the parties damnified thereby have to submit to the exercise of power delegated to third persons in violation of all law, and whether the elector in such case is remitted to a personal action against

those who executed the law for an invasion of his constitutional privileges and franchises?

The mere statement of the proposition shows its absurdity. In the case of *The People* v. *Church*, (6 Cal., 78,) the supreme court of California held that an election held at a *time* not authorized by law, was void. Ordinarily, one would think there could be little difference between an election held at a *time* not authorized by law, and one that was not held in the *manner* provided by law. Judge Crocker, in the case of *Satterlee* v. *San Francisco*, (23 Cal., 320,) says:

"The validity of an election does not depend on the eligibility of the candidates, for if it did, it might be contended that an election would be invalid because an unsuccessful candidate was disqualified to hold the office voted for. The validity of an election depends upon its being held and conducted at the proper time and place, *in the manner*, and by the persons and officers as required by law."

The *manner* of holding elections is fixed by the constitution, and it says, first, it shall be by ballot, and second, that the secrecy of that ballot shall be preserved inviolate.

Is an election held with any other ballot than the one prescribed by the constitution a legal election? Is an election held under a law where it may be ascertained by reference to the tickets and the poll-books just how every man voted, such an election or such a ballot as the constitution contemplates?

In the case of *McKune* v. *Weller*, (11 Cal., 49,) the supreme court of California said:

"All the efficacy given to the act of casting a ballot is derived *from the law-making power*, and through legislative enactment."

If it be true that a ballot receives its *efficacy* from the "law-making power," does it not necessarily follow that an exercise thereof in violation of the fundamental law cannot give it efficacy? The power to hold the constitutional convention is founded on the *vote* cast at the election. If the vote cast, and the ballot used, was one that the constitution inhibited, then there was no *election*, for an election can only be held with the ballot the constitution provides.

What the supreme court of Indiana would have decided on *quo warranto* as to what rights, if any, were conferred by a marked ballot, at the election held in that State under the law the court declared was unconstitutional, can only be a matter of conjecture; but as to what other courts have decided under a similar state of facts is well known. The question in the case of *The Commonwealth* v. *Woelper*, (3 Serg. & Rawle, 29,) was, whether a ballot, used at an election, that had a design thereon, by which it might be ascertained how certain persons voted, should be counted.

Chief-Justice Tilghman, in disposing of the case, says:

"The tickets in favor of those persons who succeeded in the election had on them the engraving of an eagle."

The judge who tried the cause charged the jury that those tickets ought not to have been counted. * * * * *

"This engraving might have several ill effects. In the first place, it might be perceived by the inspector, even when the ticket was folded. This knowledge might possibly influence him in receiving or rejecting the vote. But in the next place, it deprived those persons *who did not vote the German tickets* of that *secrecy* which the election by ballot *was intended to secure*."

The ballot used in the case just cited had an eagle on it. The by-law governing the election said, that if besides the names there are

other things on the ticket it shall not be counted. The court held that the placing a picture of an eagle on the ballot invalidated the ticket; first, because the ballot was not such a ticket as the law required, and second, because it had a tendency to destroy the secrecy *which election by ballot was intended to secure.* This being true the court would not allow the baliots thus marked to be counted.

Apply the law as laid down in this case to the matter now before us, and what is the result?

It is that neither office nor *power* can be conferred by an illegal ballot.

The marking the ballots destroyed the secrecy which the constitution guarantees. When that was destroyed the *efficacy* of the ballot was gone.

The question of what *effect* should be given to a vote that was taken in a manner at variance with the law arose in the case of *Saint Joe & Denver City Railroad* v. *Buchanan County*, (39 Mo., 488.)

There was a law authorizing the county court to make subscriptions to railroad enterprises, if a majority of the *taxable* inhabitants of the county voted therefor.

Before the vote was taken, the State of Missouri adopted a new constitution, and continued "all statute laws now in force not inconsistent with the constitution, until they expire by their own limitation, or be amended or repealed by the general assembly." One of the provisions of the constitution was, that "no county should loan its credit or become a stockholder in any company or corporation, unless two-thirds of the *qualified electors*, at a regular or special election, should assent thereto."

In disposing of the case Judge Wagner said:

"The act of the general assembly, providing for taking the vote of the people of Buchanan County, and confining it to the majority of *taxable* inhabitants, is repugnant to the constitution. * * * The constitution imposes no such restrictions, but opens the ballot to all who are qualified voters."

A two-thirds vote was received in favor of the proposition at the election; but how many were disqualified, by reason of the restriction to *taxable* inhabitants, does not appear. The effort evidently was to conform to the constitutional requirements, as to the qualification of voters, and also to carry out the act of the legislature by restricting the vote to those who are taxable inhabitants, or, in other words, to engraft the constitutional provision upon the enactment as an amendment.

"We think this could not be done. Laws, therefore, which are inoperative, on account of repugnancy to, or inconsistency with, the constitution, must be legislatively amended before they are capable of execution."

That the law providing for numbering the ballot, thereby destroying the secrecy thereof, is repugnant to, and inconsistent with, the constitution, I think has been clearly shown, and if it be true that all such laws must be amended before they are "capable of execution," it follows that, before the people of this State can have a constitutional convention composed of delegates selected at an election by ballot, they must be elected under the provisions of an act that is not repugnant to the fundamental law.

The answer to all this is that the "*people*," in their sovereign might, have expressed an unmistakable desire to rid themselves of an obnoxious government. I now propose to refer to a few of the changes made by the so-called people of Arkansas. The preamble to the act calling a constitutional convention commences by saying:

"*Whereas* it is manifest that there are many defects *and objectionable*

provisions in the present constitution of the State, and that it is not satisfactory to the people thereof."

It is but just and fair to assume that those provisions of a State constitution that have been ignored in the forming of the new, are among the provisions that the preamble to the act describes as being "objectionable and unsatisfactory to the people," and more especially does this inference arise if nineteen-twentieths of the old constitution is retained intact. In the constitution of 1868 was this provision:

"The *paramount* allegiance of every citizen is due to the Federal Government in the exercise of its constitutional powers, as the same may have been, or may be, defined by the Supreme Court of the United States; and no power exists in the people of this or any other State of the Federal Union to dissolve their connection therewith, or perform any act tending to impair, subvert, or resist the supreme authority of the United States. The Constitution of the United States confers full powers on the Federal Government to maintain and perpetuate its existence, and whensoever any of the States, or the people thereof, attempt to secede from the Federal Union, or forcibly resist the execution of the laws, the Federal Government may, by warrant of the Constitution, employ armed force in compelling obedience to its authority."

The doctrine enunciated in this provision was simply a declaration of what the loyal men of the United States contended for, and just what the disloyal element denied. Here is an assertion of four distinct propositions: *First*, that the *paramount* allegiance of the citizen is due to the Federal Government, and not to the State; *second*, that no power existed in the people of any State to dissolve their connection with the Federal Union: *third*, a denial of the right to secede; and *fourth*, that the Federal Constitution is a warrant of sufficient authority to authorize the employment of force if a State attempted to secede or forcibly resist the execution of the laws of the United States.

The first thing—the first act of the "people," whose shortcomings and violations of the laws and constitution of the State you are expected to overlook, was to strike this provision out of the constitution of Arkansas. This act of the so-called people of Arkansas simply amounts to a denial of the concessions therein made. It not only amounts to a denial of the concessions therein made, but it amounts, under the circumstances, to an assertion, first, that the *paramount* allegiance of the citizen is not due to the Federal Government; second, that the power exists in the people of any State to dissolve their connection with the Federal Union; third, that the right to secede exists and belongs to the people of any State; and, fourth, that the Constitution of the United States does not warrant the employment of armed force to prevent a dissolution of the Union, or prevent a State from seceding, or to compel obedience to the laws.

Not content with asserting that the *paramount* allegiance of the citizen is not due to the Federal Government, and re-asserting the right of secession, they next proceeded to strike out the following provision:

"All action of the State of Arkansas under the authority of the convention which assembled at Little Rock on the 4th of March, 1861, its ordinances or its constitution, whether legislative, judicial or military, was, and is hereby, declared null and void; and no *debt* or *liability* of the State of Arkansas, incurred by the action of said convention, or of the general assembly, or any department of the government under the authority of either, shall be recognized as obligatory."

A provision similar to this was inserted in the constitution of 1864, but the supreme court of the State, as organized before re-construction,

in construing this provision of the constitution of 1864, in the case of *Hawkins* v. *Filkins*, (24 Ark., 286.) declared that *all* the acts of the State of Arkansas, save and except such as conflicted with the Constitution and laws of the United States, were as valid and binding as though the State had sustained its relations with the Federal Government, instead of aiding the rebellion with the revenues of the State, and with the services of the able-bodied men thereof. At this point I desire to direct your attention to another historical fact. The fourteenth amendment was submitted to a legislature composed of the same class of men who now constitute the Garland legislature; in fact, many of the members of the Garland legislature were members of the legislature to which the fourteenth amendment was first submitted. That legislature refused to ratify the amendment and treated it in the most contemptuous manner. There is not a single letter, word or sentence, in the proposed new constitution, recognizing or accepting a single provision of the fourteenth amendment. You will be told these people accept the thirteenth, fourteenth, and fifteenth amendments to the Constitution of the United States, yet before I have done with this subject I will show to you that every provision of the constitution of 1868, that in any manner recognized the fourteenth amendment, has been stricken out, and ignored in the forming of the new. If it be true that these men have accepted the provisions of the fourteenth amendment, why is it we find them in hot haste to strike out a provision of the State constitution, that inhibited the payment of any *debt* or *obligation* incurred by the action of the secession convention, the assembly that met thereunder, or any department of government? That the State did incur debts and obligations in aid of insurrection and rebellion that have not been paid, is well known. This being true, I repeat, what was the object in striking out the provision? The truth of the matter is, the way is being paved to legalize the acts of the State of Arkansas during the time it yielded allegiance to the Confederate States government, and to assume the payment of its outstanding rebel debts. Why, sir, during last week the house of representatives of that State passed a bill the first section of which is as follows:

"AN ACT to confirm and make valid the title to certain school-lands.

"*Be it enacted by the general assembly of the State of Arkansas:* SECTION 1. That all patents issued for the sixteenth sections, or any part thereof, or common-school land, *during the war of the rebellion*, and all the official acts of the officers of this State in regard to such lands *during the said war*, and also all deeds made by the common-school commissioners of the several counties in compliance with the act of the legislature of this State entitled 'An act to relieve certain citizens of Arkansas who purchased school-lands,' passed March 4, 1867, be, and the same is hereby, confirmed, ratified, and made valid, and full faith and credit shall be given to said patents, deeds, and official acts in all the courts of this State."

This is nothing more nor less than an attempt to rob the children of that State of the benefit of the school-fund arising from the sale of lands donated to the State by the United States for school-purposes. The lands described in the bill were paid for, if paid at all, in confederate money or Arkansas war-bonds, all of which was spent in aid of the rebellion long since. On the adoption of the constitution of 1868, the issuing of patents for lands thus sold ceased, but it seems they are now to be validated at the expense of a trust fund given the State by the United States for purposes of public education.

The fourteenth amendment not only inhibits a State from paying debts and obligations incurred in aid of the rebellion, but it also inhibits a State from paying, or assuming "to pay, any debt or obligation or claim for the emancipation of slaves." In the constitution of 1868 was the following provision on the subject of paying for slaves emancipated:

(Sec. 38, Art. V.) "The general assembly shall have no power to make compensation for emancipated slaves."

This provision, like the two others I have named, has been stricken out. In the constitution of 1868, was a provision which reads as follows:

(Sec. 20, Art. XV.) "No person shall be allowed or qualified to sit on a jury who is not a qualified elector." This provision has been stricken out, and the legislature may now fix such qualifications for jurors as may seem meet to that body. The object is to deprive colored men of the right to sit on juries.

The striking out of these provisions is not the result of ignorance or oversight. They relate to prominent issues that have been before the country for years.

In the constitution of 1868, the oath of office prescribed by the constitution of the State is as follows:

"I, , do solemnly swear that * * * I will honestly and faithfully support *and defend* the Constitution *and laws* of the United States, *the Union of the States*, and the constitution *and laws* of the State of Arkansas."

In revising the oath of office, the framers of the Garland constitution have so amended the same as to read as follows:

"I do solemnly swear that I will support the Constitution of the United States and the constitution of the State of Arkansas."

Now let us examine these changes, and find what "objectionable provisions" were in the first oath that were "not satisfactory to the people of Arkansas." After the word "support" the words "and defend" are stricken out. After the word "Constitution," where the Constitution of the United States is referred to, the words "and laws" are stricken out. After the words "the Constitution of the United States," the words, "*the Union of the States*" are stricken out. After the word "constitution," where reference is made to the constitution of Arkansas, the words "and laws" are stricken out.

The men who revised this oath must have had some *object* in view. First, we find the words "and defend," where they occur after the word "support," stricken out. This evidences that there is a class of men in Arkansas that are willing to take an oath to support the *Constitution* of the United States, but are not willing to *defend* the same nor support the "*laws*." It evidences the fact that there is a class of men in Arkansas who are not willing to take an oath to either *support* or *defend* "the Union of the States" nor the "*laws*" of the State of Arkansas. It may be said that an oath to support the Constitution of the United States is equivalent to swearing that they will "defend" the same. Ordinarily the word "support" would include a defense of the thing to be supported. But it must be borne in mind that the oath of office is a *revision* of the oath of office prescribed by the constitution of 1868. Answer me this question: Does not the striking out the words "and defend," where they occur after the word "support," conclusively show that the word "support" is not intended to be used in its broadest sense, but that it is used in a qualified sense? What does the word "support" mean when it is used with such qualifications? Webster says it means "to bear, to endure." Now, sirs, we have it as the oath of office

that the officers of the Garland government are willing "to bear" and "to endure" the Constitution of the United States. How long is not stated. Nor does the animus of these men stop here. The VIth article of the Constitution of the United States declares, "This Constitution and the *laws* made in pursuance thereof shall be the supreme law of the land." Notwithstanding this provision, the "people" of Arkansas, whose revolutionary acts you will be asked to legalize, are unwilling that any officer of their government shall take an oath to either "support or defend" the *laws* of the United States, or the laws of the State wherein they reside. It is a well-known fact that but few, if any, of the persons who support the Garland government were either pleased or gratified at the enactment and enforcement of the reconstruction acts. It is a well-known fact that the legislature of 1866–'67, which refused to ratify the XIVth amendment, appointed ten or fifteen of its members to visit Andrew Johnson, and condole with him over the fact that he was hampered by a loyal and republican Congress. It is evident that the men who did not want to take an oath to support and defend the "*laws*" of the United States must have had some reason for so doing. My impression is that the reason why they are not willing to take an oath to support the *laws* of the United States is that they are not willing to support the legislation enacted by Congress *to enforce the XIIIth, XIVth, and XVth amendments.* There are a great many persons in the United States who do not believe these amendments to have been legally ratified; and no State of this Union, in proportion to her population, has so many persons who indulge in that belief as has the State of Arkansas, and I think the matters to which I have called your attention warrant me in making the assertion.

Now, sirs, take the changes made in the form of the oath: the striking out of a provision asserting that the paramount allegiance of the citizen is due to the Federal Government; the striking out of a provision that asserted no power existed in the people to dissolve their connection with the Federal Government; the striking out of a provision denying the right of secession; the striking out of a provision asserting that the Federal Government is clothed with power to perpetuate its existence by force of arms; the striking out of a provision inhibiting the legislature from paying for emancipated slaves; the striking out of a provision prohibiting the legislature from paying any debt or liability incurred in support of the rebellion, and tell me what these things evidence.

You cannot shut your eyes to the fact, nor can Congress shut its eyes to the fact, that Arkansas has taken a step that, if not checked, will lead to an unsettlement of the issues of the war. It is well known, and is a part of the public history of the country, that the States of Virginia, North Carolina, South Carolina, Georgia, Mississippi, Alabama, Louisiana, Florida, Texas, and Arkansas were in rebellion against the United States and its authority. It is also well known that all of the States named, under some pretended authority of the President, framed and adopted constitutions, *before* the passage of the reconstruction acts. It is also well known that Congress for some reason would not admit any of these States to representation in Congress under the constitutions so framed. On examination of the constitutions of the States named, I find that *no one of them* recognized the doctrine that the paramount allegiance of the citizen was due to the United States. On examination of the constitutions framed under the reconstruction acts, I find that *every one of them* has a clause recognizing that the paramount allegiance of the citizen is due to the United States, and a denial of the right of secession.

The present constitution of Alabama contains this provision:

"That this State has no right to sever its relations to the Federal Union, or to pass any law in derogation of the paramount allegiance of the citizens of this State to the Government of the United States."

The constitution of Florida has this provision:

"The paramount allegiance of every citizen is due to the Federal Government, and no power exists with the people of this State to dissolve its connection therewith. This State shall ever remain a member of the American Union; the people thereof, a part of the American nation. Any attempt, from whatever source or upon whatever pretense, to dissolve said Union or to sever said nation, shall be resisted with the whole power of the State."

The constitution of Georgia has this provision:

"The State of Georgia shall ever remain a member of the American Union; the people thereof are a part of the American nation; every citizen thereof owes paramount allegiance to the Constitution and Government of the United States, and no law or ordinance of this State, in contravention or subversion thereof, shall ever have any binding force."

The constitution of Louisiana has this provision:

"The citizens of this State owe allegiance to the United States, and this allegiance is paramount to that they owe to this State."

The constitution of Mississippi has this provision:

"The right to withdraw from the Federal Union on account of any real or supposed grievance shall never be assumed by this State, nor shall any law be passed in derogation of the paramount allegiance of the citizens of this State to the Government of the United States."

The constitution of North Carolina has this provision:

"That this State shall ever remain a member of the American Union; that the people thereof are a part of the American nation; that there is no right on the part of this State to secede, and that all attempts, from whatever source or upon whatever pretext, to dissolve said Union or to sever said nation, ought to be resisted with the whole power of the State. That every citizen of said State owes paramount allegiance to the Constitution and Government of the United States, and that no law or ordinance of the State, in contravention or subversion thereof, can have any binding force."

The constitution of South Carolina has this provision:

"Every citizen of this State owes paramount allegiance to the Constitution and Government of the United States, and no law or ordinance of this State, in contravention or subversion thereof, can have any binding force. This State shall ever remain a member of the American Union, and all attempts, from whatever source or upon whatever pretext, to dissolve the said Union, shall be resisted with the whole power of the State."

The constitution of Texas has this provision:

"That the heresies of nullification and secession, which brought the country to grief, may be eliminated from future political discussion, we declare that the Constitution of the United States, and the laws and treaties made, and to be made, in pursuance thereof, are acknowledged to be the supreme law, and that this constitution is framed in harmony with and in subordination thereto."

The constitution of Virginia has a provision the same as that of Georgia.

Of the four States (West Virginia, Maryland, Missouri, and Nebraska) holding constitutional conventions since or during the existence of the

rebellion, all have similar provisions on the subject of allegiance and of that of secession as the States from whose constitutions I have quoted.

I take it, sirs, the concessions made by the States lately in rebellion, that the paramount allegiance of the citizen is due to the Federal Government, and renouncing the doctrine of secession, are in the nature of a compact, *and a part of the terms of surrender*. The State of Arkansas, if the Garland government is recognized, has a constitution that Congress would not have admitted it to representation with at any time since the surrender. When you take into consideration the fact that, in order to get the acknowledgment that the paramount allegiance of the citizen was due to the General Government, and a renunciation of the doctrine of secession, from these States, Congress had to disfranchise a considerable number of the white electors of those States, and enfranchise the male black population over the age of twenty-one years, in order to get the concessions now made in their constitutions, it becomes Congress, now that disfranchisement no longer exists in any of the States, to jealously watch every attempt to withdraw them.

At the time of the adoption of the constitution of 1868, the State of Arkansas had a debt which, when funded, amounted to about five millions of dollars. One and one-half millions of this amount is due to the United States, arising out of investing the Smithsonian fund in the bonds of the State of Arkansas, and the investment of certain Indian trust-funds therein. Under the constitution of 1868, the faith and credit of the State was pledged to the payment of this debt, and a *sinking-fund* provided to pay the same. Under the Garland constitution, the faith and credit of the State is no longer pledged to the payment of this debt, and no provision is made for a sinking-fund. When the convention that framed the constitution of 1874, that Mr. Garland is now administering, was considering the financial clause thereof, Mr. Barnes offered a new section, as follows:

"The faith and credit of the State of Arkansas is pledged to the payment of all bonds issued under the provisions of an act entitled 'An act to aid in the construction of railroads,' approved July 1, 1868; of all bonds issued under the provisions of an act entitled 'An act to provide for the funding of the public debt of the State,' approved April 6, 1869; and of all bonds issued under the provision of an act entitled 'An act providing for the building and repairing of the public levees of the State,' approved March 16, 1869, and all acts amendatory thereof or amendatory thereto; and the auditor of state shall annually, on the first day of September in each and every year, by computation, ascertain the amount of money required to pay the interest on said bonds as the same become due, and to meet the principal at maturity of the bonds; and when the amount shall be so ascertained, the auditor of state shall notify the county clerks of the different counties of the rate per cent. necessary to pay said interest and create a fund sufficient to pay the principal at the maturity of the bonds; and the same shall be placed on the tax-books of said county and collected in the same manner as other taxes, and paid over to the State treasurer."

Mr. Smoote moved to table the section.

The yeas and nays were ordered, as follows: Yeas, 77; nays, 9.

You will see by this, that the question of paying the public debt of the State was presented *directly* to the attention of the convention, and that it refused to renew the pledges given by the constitution of 1868, or to create a sinking-fund for the payment of either the principal or interest thereof. But, instead of making any such provision, the convention inserted the following provision:

"SEC. 8. The general assembly shall not have power to levy State taxes for any one year to exceed in the aggregate *one per cent.* of the assessed valuation of the property of the State for that year."

With this restriction upon the taxing-power of the general assembly, the interest upon her bonded debt and the ordinary expenses of the State government cannot be paid. A portion of the debt of Arkansas was at one time in dispute, but when the same was ordered funded the disputed debt was placed on the same equality of other bonded indebtedness. The people of Arkansas who sustain the Garland government mean repudiation of the public debt of the State, over one million and a half of which is held by the United States, and they mean nothing else. The debt was created, except that arising from railroad-aid and levee bonds, in 1836. At the beginning of the war the treasury of Arkansas had more than a half million of dollars in her coffers, and the State tax was but one-sixth or one-eighth of one per cent., and during a period of more than a quarter of a century they failed and refused to pay one dollar of interest on either the acknowledged or the disputed debt of the State. Having secured a recognition of the debt, are you going to throw it away?

I desire once more to call your attention to the fact that the cause assigned for calling a constitutional convention was "to get rid of many *defects* and *objectionable provisions* that were not satisfactory to the State of Arkansas." I have pointed out to you a few of the provisions that the Garland constitution rids the people of that State of, and, having done this, it is but fair that I should point to "defects" of the constitution of 1868 that have been remedied by the new. I say to you, without fear of successful contradiction, that outside of the simple reduction of the supreme court from five to three supreme judges, and the abolition of the office of lieutenant-governor, the constitutional convention, nor the constitution framed by it, and declared adopted by men of its own choosing, has not done anything for the benefit of the people of that State which could not have been conferred upon them *by an act of the legislature that called the convention.*

Now, sir, I come to a point that I regard as fatal to the Garland government, if *all* the others named are pronounced untenable. We have already seen that, in a peaceful government, the only manner in which the voice of the people can be obtained is under the operation and in accordance with a *law* of the State.

The constitutional convention of Arkansas attempted to pass a law regulating and prescribing how the judges of election should be selected; to whom the returns should be made, and how the constitution should be declared ratified. The act calling the constitutional convention failed to provide the manner and mode that should be pursued by the people for ascertaining the sense of the people thereon. I shall not insult your intelligence by entering into any lengthy argument, or citing any great number of authorities to show that a constitutional convention is not clothed with *legislative* power. In speaking of the power of a constitutional convention to pass an ordinance regulating the taking of a vote thereon, the supreme court of Pennsylvania said, (*Wells and others* v. *Election Commissioners:*

"The convention is *not* a co-ordinate branch of the government. It exercises *no governmental power*, but is a body raised by *law*, in aid of the popular desire to *discuss* and *propose* amendments, which have no *governing force*, so long as they remain propositions. While it acts within the scope of its delegated powers it is not amenable for its

acts; but when it assumes to *legislate*, to repeal and displace existing institutions, it acts *without authority.*"

Just what the supreme court of Pennsylvania said a constitutional convention *could not do* has been done by the pretended constitutional convention of Arkansas. The constitution and laws of Arkansas make *registration* a prerequisite to voting. The registration once made, it stands for two years, unless it should be made to appear to the governor that a proper registration was not made at the time prescribed by law, in which event he is authorized to order another. The regular time for making the registration was preceding the election held on the 5th of November of 1872, but for reasons not within the law Elisha Baxter ordered another just preceding the election held in November of 1873. No subsequent registration having been made, by the governor, one of two things becomes indisputably true, and that is that one or the other of these registrations fixed and determined the qualifications of electors at *all* elections to be holden thereafter until a new registration was made in pursuance of law. This proposition, I presume, will not be denied. The question now arises, "Did the constitutional convention have the power to order a registration for the purpose of holding an election for the adoption or rejection of the constitution?"

The 23d section of the registration act confers *this* power on the governor. If the supreme court of Pennsylvania are correct as to the law of the case—and I think they are—the sole power of the convention was to *discuss* and *propose* amendments. I have not the time to go into all the acts of lawlessness and usurpation of power that have kept pace with the initiation and the pretended adoption of the Garland constitution, but it will be sufficient to say their name is legion, and of a character the mere recital of which shocks the moral sensibilities of every man who has any regard for the law. The constitution, and the new amendments to the same, require a registration of voters previous to voting, as a prerequisite. It was held, in the case of *The People* v. *Kopplekorn*, (16 Mich., 342,) that an election is void where there had been no registration, notwithstanding the persons voting were otherwise legal voters. The 6th section of the election act says:

"The judges of election, appointed as aforesaid, shall be the judges of *all* elections, within their respective districts, *until the next general election.*"

By the ordinance of the convention, that body elected three commissioners and clothed them with authority (that is, if the ordinance could confer it) to appoint supervisors for each county, whose duty it was to appoint the judges of election. These judges of election received the votes and made a return of them to the men who appointed them, and these appointees made a return to the men who appointed them. I insist a constitutional convention is not, and cannot be, clothed inherently with any such power. In the first place, if the legislature had proposed to give the convention *the power of legislation*, it could not have done so. Legislative power cannot be delegated, (*Rice* v. *Foster*, 4 Harr., Del.) Legislative power can neither be delegated to the delegates of a constitutional convention nor to the people themselves. This question has been so often adjudicated that I do not feel it even necessary to cite the cases, much less to go into any extended argument on the subject.

There seems to be a wild and ungovernable delusion in the minds of some people that a constitutional convention may do anything. There is nothing in it; nor is it necessary to clothe it with any other power than to *discuss* and *propose* propositions for adoption. A constitutional

convention is supposed to be a creature of the *law*; it is presumed to be subordinate to the constitution, and to be sitting under the authority and protection of the constitution and laws of the State. If it is not, it is a revolutionary body, and must support itself by force. It must be a lawful or an unlawful assemblage, for, under the American system of government, there is no such thing as a government of half *force* and half *law*.

The power of suspending and setting aside the laws is purely a *legislative* function. If it is, then it must be exercised by the *legislature*. The error in supposing a constitutional convention is clothed with extraordinary powers grows out of the fact that the ignorant too often confound the *members of the convention* with *the people*. The delegates are no more "the people" than are the members of the legislature. Each are representatives, and each have separate functions to perform. One enacts *laws* for a body-corporate, while the other seeks to devise and propose a system of government, wherein the defects of the old government shall be remedied. The convention *proposes*, and the people *dispose* of its work. As to whether that system is better than the old, is a question the people determine for themselves, *through the forms of law*. If you will but keep before your minds that a constitutional convention is only a representative body for the purpose for which it is called; if you will not lose sight of the fact that it is an assemblage having only *delegated powers*, you will have no trouble in arriving at the conclusion that the convention and the people are not *identical*. But suppose we admit that they are, and what follows? Are the friends of the Garland government any better off with this admission than they are without it? I think not. At the time of the calling of the convention *all* the *legislative* power of the people of the State of Arkansas was lodged with the *legislature*. This being true, the people of Arkansas had no *legislative power* to delegate, either to a constitutional convention or any other body of men. Does it not stand to reason that if the people themselves could not give force, validity, and effect to an act of the legislature, they cannot confer legislative power? If in the formation of the government the people delegated away *all* the *legislative* power they possessed, does it not stand to reason that there was nothing left to delegate?

The manner and mode of passing *laws* for the government of the people of Arkansas is plainly and distinctly defined. *First*. Every bill must be read three times, on different days, before the final passage thereof, unless two-thirds of the house where the same is pending shall dispense with the rules. *Second*. A majority of all the members voting must vote therefor before it becomes a *law*; and *Third*. On the final passage of all bills the vote shall be taken by yeas and nays, and entered on the *journal*. After this formality has been gone through, what then? Why, every bill and concurrent resolution, except of adjournment, must be presented to the governor for his approval or disapproval. If he approves it, he shall sign it; if not, he shall return it to the house where it originated. Have these formalities been observed? Has the ordinance been submitted to the governor? Has it been read three times on different days? Have the yeas and nays been called and entered upon the *journal*? Did a majority vote for it? Where is the evidence that any one ever voted for this ordinance? I suppose some one will say it will be found in the journal of the *convention*. Suppose it is found there, *it proves nothing*. The convention *was not required to keep a journal*, and there is not a court in existence anywhere in the civilized world that would admit in evidence the records of a body

that was not bound to make a record of its proceedings to prove anything. A constitutional convention does not need a *journal*. Its action binds no one until the people have ratified its work; and that done, it is a matter of no importance to know whether a section was read once, twice, or three times before it was submitted.

Laws for the State of Arkansas cannot be made in this manner, nor can the laws be suspended and set aside by an assemblage that is only clothed with power to *propose* and *suggest* improvements in the fundamental law. No doubt some of our learned friends on the other side will call your attention to the fact that the act calling the convention authorizes it to frame a constitution and provide for putting the same in force. What power is conferred by the language "and provide for putting the same in force?" It will be observed that nothing is said as to the *time*, *place*, and *manner* of submitting the same, nor is there any mode pointed out *how* the same was to be "put in force." It may be said under this power that the convention could have declared the constitution ratified and in force without having submitted the same to the people. What it *might* have done is one thing, and what it *did* do is quite another; therefore I shall not discuss the abstract proposition of what the convention "might have done."

I have a case in point, where, according to my notion of things, greater power was conferred on a constitutional convention than in the present case. The question arose in the State of Pennsylvania, and was, whether, under the fifth section of the act convening a constitutional convention, the convention had the power to regulate the mode and manner of voting thereon, or of ascertaining and declaring the result. The fifth section alluded to reads as follows:

"The convention shall submit the amendments agreed to by it to the qualified voters of the State for their adoption or rejection, at such *time* or *times* and in such *manner* as the convention shall prescribe." Under the authority conferred, or rather supposed to be conferred, by this section, the convention passed an ordinance appointing five commissioners, and authorizing them to make a registration of the voters of the city of Philadelphia and appoint the persons to conduct the election. The power exercised by the constitutional convention in Pennsylvania, as will be seen, was almost identical with that exercised in Arkansas. It strikes me that the power to provide the *time* and *manner* of taking the sense of the people upon the adoption or rejection of an instrument is the conference of as much power as is contained in the words "to provide for putting the same into force."

The power of providing for putting a thing *in force* is to fix a *time* when (in the event the constitution was adopted) it should *go into effect*, and does not include the power to regulate the means to be pursued *for its adoption* or for the ascertainment and *declaration of the fact*.

The supreme court of Pennsylvania, in disposing of the question presented by the section quoted, and the facts stated, said:

"The power claimed for the convention is, by ordinance, to raise a commission to direct the election upon the amended constitution in the city of Philadelphia, and to confer on this commission the power to make a registration of voters and furnish a list so made to the election officers of each precinct; to appoint a judge and two inspectors for each division, by whom the election therein shall be *conducted*. This ordinance further claims the power to regulate the qualifications of the officers thus appointed to hold the election, and to control the general returns of the election. It is clear, therefore, that the ordinance assumes a *present* power to displace the election officers now in office under the election

laws for the city; to substitute officers appointed under the authority of the convention, and to set aside these election laws so far as relates to the qualification of the officers and the manner in which the general returns shall be made. The authority to do this is claimed under the fifth section, giving the convention power to *submit* the amendments at such time or *times* and in such *manner* as the convention shall prescribe. It is argued that the *manner* of submission confers a power to *conduct the election* upon the *matter submitted*. To state the proposition is to refute it. For the *manner* of submitting the amendments is a totally different thing *from conducting the election* upon the submitted amendments.

"The question before us is, Can the convention, before they either proclaim a constitution themselves, if they have the power, or before any ratification, if they have not, pass an ordinance to repeal an existing system of laws on a particular subject? This is a question of *power*, and not of *wisdom*. However wise the substitution of their own election-machinery for that provided by law for this city may be, the question is not for us. We can decide only the question of *power*. The convention is not a co-ordinate branch of government. It exercises *no governmental power*, but is a body raised by *law*, in aid of the popular desire to *discuss* and *propose* amendments which have *no governing force* so long as they remain propositions. While it acts within the scope of its delegated powers it is not amenable for its acts, but when it assumes *to legislate*, to repeal and *displace existing institutions* before they are displaced by the adoption of *its* propositions, it acts *without authority*."

I do not deem it necessary to comment on this decision, for it seems to me it settles this case, even if you should disagree with me as to all the other points.

The powers of a convention of the people are not often the subject of judicial determination. Indeed, I know of but few instances where the courts have adjudicated the question. A convention of the people was called in South Carolina, for a specific purpose, to wit, that of nullifying certain acts of Congress. Among other things, the convention passed an ordinance empowering the general assembly "to provide for the administration of an oath to the citizens and officers of the State," &c.

The legislature, under the power conferred by the *ordinance* of the convention, passed an act requiring, in addition to the oath prescribed by the constitution of the State, that the person named would be "faithful and bear true allegiance to the State of South Carolina."

McCready having been appointed to an office in the militia, took the oath prescribed by the constitution, and demanded his commission. This was refused him unless he would take the additional oath.

Thereupon he applied for a mandamus against the person holding his commission, to compel its delivery.

The ordinance to which I call your attention, like the ordinance in South Carolina, was not submitted to the people.

Judge O'Neal, in commenting on the power of a convention of the people, says. (*State* v. *Hunt*, 2 Hill, S. C., 223:)

"In one point of view, a convention may be illimitable. It is, however, then a *revolutionary* and *not* a constitutional convention. I do not understand that this revolutionary character is claimed for the convention which ordained the ordinance now under consideration. * * It is true the legislature cannot limit the convention, but if the people elect for the purpose of doing a specific act or duty, pointed out by the act of the legislature, the *act* could define their powers. For the people elect with reference to that and nothing else. A convention assembled

under the constitution is only the people for the purpose *for which it assembles*, and if they exceed those purposes their act is void unless it is submitted to the people and affirmed by them."

Judge Thompson, in the same case, says:

"In the appointment of delegates to that convention, the people acted on the faith that they were to be charged with those duties, (those named in the act,) and no other, and the assumption of any other powers than those necessary to the attainment of the objects in view would have been a violation of trust reposed in them, and a usurpation of the rights of the people. The idea is, that the convention is possessed of all the powers of the people, and might rightfully exercise it in relation to all subjects, and in any manner they might think fit. Can it be supposed that the good people of this State thought that in the appointment of delegates to that convention they were conferring on them the authority to transfer their allegiance to the Grand Turk or the Emperor of Russia? * * * The foundation upon which all our institutions are built is, that the will of the people is supreme, nor will it be questioned that it is equally imperative when expressed through agents regularly constituted by them for that purpose. But surely, when any body of men, however august, take upon themselves to act in the name of the people, an individual who supposes his rights invaded, may be permitted, respectfully, to ask for their authority, and to that request, the courts, the organs appointed by the constitution to administer justice, are bound to respond. If an unauthorized assembly should take upon itself to send forth an edict, in the name of the people, commanding obedience to its dictates, would that be binding on the citizens? Certainly not. And in what does this differ from the act of a regularly constituted body who assume powers not delegated by the people?"

In the year 1849 the people of California adopted a constitution in which I find the following provision:

"If at any time two-thirds of the senate and assembly shall think it necessary to revise and change this *entire* constitution, they shall recommend to the electors at the next election for members of the legislature to vote for or against the convention; and if it shall appear that a majority of the electors voting at such election have voted in favor of calling a convention, the legislature shall, at its next session, provide by law for calling a convention, to be holden within six months after the passage of such law; and such convention shall consist of a number of members not less than that of both branches of the legislature."

You will observe that this clause does not provide the machinery for the conduct of the election, and the ascertainment and declaration of its result. Now, I desire to call your attention to an amendment made to the constitution of that State, and the conference of power therein contained. The amendment is as follows:

"The constitution that may have been agreed upon and adopted by such convention shall be submitted to the people at a special election, to be provided for by law. * * * The returns of such election shall, in such manner *as the convention shall direct*, be certified to the executive of the State, who shall call to his assistance the treasurer and secretary of state, and compare the votes so certified to him. If, by such examination, it be ascertained that the whole number of votes cast at such election be in favor of such new constitution, the executive of this State shall, by proclamation, declare such new constitution to be the constitution of the State of California."

This amendment seems to have been added to the constitution of California for the *sole* purpose of conferring on the constitutional con-

vention the power to provide for the conduct of the election to be holden for the adoption of the constitution. Is it at all probable the people of that State would have gone to the trouble of adding an amendment to their constitution conferring this power if the legislature could have delegated the power to a convention, or if it was one of the *inherent* powers of the convention? The trouble in this country is, that we are liable to attribute entirely too much power to irresponsible bodies. Napoleon the First derived the power that afterward made him Emperor of France through the action of an assemblage that claimed and exercised no greater powers than our opponents claim belong to a constitutional convention. The idea that a constitutional convention and its members are above *all* law is simply preposterous. If it is above the constitution, if it is beyond the control of law, you have created a government in which the executive, legislative, and judicial departments are all united, and united irrevocably.

Would that be a republican form of government where the whole power of the State is lodged in the hands of seventy-five or eighty men who are above all law, and who have the right to suspend courts, judges, and the whole machinery of government by a simple ordinance, the people having no means of ascertaining whether it ever received even a majority vote of the members? If the power extends to the suspension of one law, it extends to all; if their acts are binding in one respect, they are binding in all. Have you ever paused to reflect on what would be the condition of a State if a constitutional convention should assert the power our friends on the other side say it possesses, *if it refused to surrender the power?* They are elected *for an indefinite term;* will any one of you tell me the tenure of office belonging to a delegate to a constitutional convention? Is it possible that the people of this country cannot take the steps to quietly and peacefully alter and amend their organic act without placing a power in the hands of the persons selected for that purpose that may be destructive of their own liberties, and that, too, without their assent? The question is not whether the delegates will *use* their power oppressively; this, I say, is not the question, but it is, do they *possess* it at all?

Let me direct your attention to the ordinance of the convention, and I do this not for the purpose of pointing out a defect in the ordinance as an ordinance, but for the purpose of showing the danger to all constitutional forms of government if the action of the Arkansas constitutional convention is allowed to pass into a precedent. The power to declare the constitution adopted is vested in three persons selected by the convention itself. From the decision of these three men there is no appeal, save to the Congress of the United States. In the ordinance submitting the constitution of 1868 to a vote of the qualified electors was this provision:

"The said commissioners shall have power to inquire into the fairness or validity of the voting upon the ratification of this constitution, * * * and shall also have power, when it is made to appear that fraud, fear, violence, improper influence, or restraint were used, or persons were prevented, or intimidated, from voting at such elections, to take such steps, either by setting aside the election and ordering a new one, or rejecting votes, or correcting the result in any county or precinct, as may in such cases be just and equitable."

When we come to take into consideration that the ordinance submitting the constitution of 1874 is almost identical in every respect with the ordinance submitting the constitution of 1868, except that the section cited *has been stricken out*, does it not at once become apparent

that the constitution of 1874 was to have been declared adopted at all hazards? And more especially does this appear so, when you come to examine the ordinance and find no provision in it punishing them for any act of misfeasance or maladministration.

Senator Buckalew, when the bill for the admission of Arkansas was pending before the Senate, criticised very severely the action of the constitutional convention of 1868 for lodging power of this kind in a board composed of three persons.

If indignation could be indulged in by a Senator of the United States over a provision *allowing a contest*, what would he have said about an ordinance that did not allow a contest to be made at all?

The Garland constitution was put in force by the declaration of three persons appointed by the convention. The result was ascertained and declared by persons in no manner responsible to the then *existing* State government of Arkansas. President Tyler said to the governor of Rhode Island, that "until he was advised, in a regular manner, that the constitution of that State had been altered and abolished, and another substituted in its place, by *legal* and peaceable proceedings, adopted and pursued *by the authorities* and people of the State, he would respect the requisitions of *that* government which has been recognized as the existing government through *all time past*." Answer me if the proceedings in the Arkansas case have been *legal* and *peaceable*, and whether another constitution has been substituted and adopted *by the authorities* and the people of the State? If so, point out to me what "authorities" of the State have so declared. Will it be contended that the three persons who declared the constitution ratified were "*authorities*" of the State? The supreme court of Pennsylvania, in the case of *Wells and others* v. *Election Commissioners*, said that if a constitutional convention assumed "to legislate to repeal and displace existing institutions before they are displaced by the adoption of its propositions, * * * the citizens injured thereby are entitled, under the declaration of rights, to an *open* court, and redress at our hands." Judge Thompson, in the case of *The State* v. *Hunt* (2 Hill, S. C., 223,) said:

"When any body of men, however august, take upon themselves to act in the name of the people, an individual who supposes his rights invaded may be permitted respectfully to ask for their authority, and to that request *the courts*, the organs appointed by the constitution to administer justice, are bound to respond."

What courts are bound to respond? The courts that are created by the exercise of fraud, violence, and in violation of all law, or the courts of the *existing government?* These courts both agree that *the courts* have jurisdiction of all questions of this character. Does not this show conclusively that these are *the* "authorities" referred to by President Tyler? What evidence have you, or in what are you advised, that the "authorities" of Arkansas have altered and abolished the government created by the constitution of 1868?

It may be urged that the fact that the constitutional convention of 1868 passed an ordinance for submitting the constitution is a precedent to prove that a constitutional convention possesses this power. Lest this thing should mislead those who are not familiar with the facts, allow me to direct your attention to two things: First, that the fourth section of the act of Congress of March 3, 1867, provides "that said constitution shall be submitted *by the convention* for ratification to the persons registered;" and second, that no attempt was made to, in any manner, antagonize or change the mode of election *prescribed by the act of Congress.*

But, sirs, suppose we admit for argument' sake that the convention possessed the power to provide for and conduct an election for the purpose of "*putting the constitution in force*," this certainly would not confer power on the convention to provide *for the election of State and county officers.* The State had plenty of State and county officers, and the constitution could have been "put in force" without disturbing any of them until such time as the legislature directed an election. It may be said the schedule or ordinance providing for the election is a part of the constitution. The ordinance submitting the constitution did not submit the *ordinance* to a vote of the people. Even if it did, it could have no binding force or effect until declared ratified. The election was held on the 13th of October, and the announcement of the result was not made until the 30th. Can the people of a State give an ordinance a retroactive effect when it is not so provided in the act? If they cannot, Mr. Garland and the officers of his government derived their title to office at an election, or rather a pretended election, not authorized by *law.* It may be said that the constitutional convention of 1868 did the same thing now complained of. So it did; but Congress by the admission of Senators and Representatives recognized that election. There is no doubt but Congress could have ordered an election to be held for State and county officers, notwithstanding the election held under the provisions of the ordinance. When California was admitted she came in with a full set of officers, without the assistance of an enabling act, or any provision having been made for the election of State and county officers by Congress, and the recognition thus given was curative of all that preceded the election; and the same is true of the election of State officers for Arkansas under the constitution of 1868. If Congress should approve the election held under the Garland constitution it would cure all defects, at least so as to preclude inquiry.

There is one matter more that I desire to call your attention to, and I will close. Arkansas was admitted to representation under the provisions of "An act to admit the State of Arkansas to representation in Congress," passed June 22, 1868, upon the following fundamental condition:

"That the *constitution* of Arkansas shall never be so amended or changed as to deprive any citizen, or class of citizens, of the United States of the right to vote, who are entitled to vote by the constitution herein recognized, * * * * *Provided*, That any alteration of said constitution, *prospective in its effect*, may be made in regard to the *time* and *place* of residence of voters."

The "fundamental condition" upon which Arkansas was admitted has been violated. Under the constitution of 1868 "every male person who has been naturalized, or has legally declared his intention to become a citizen of the United States, who is twenty-one years old and upward, and who shall have resided in this State *six* months next preceding the election, and who at the time is an actual resident of the county in which he offers to vote, shall be deemed an elector."

Under the provisions of the Garland constitution the term of residence in the State is changed from *six* to *twelve* months, and where the constitution of 1868 did not specify the length of residence in the county or township, the Garland constitution imposes a residence of six months in the county and thirty days in the township. I do not say this is not a wise provision, but I do say that it is not "*prospective in its effect*" as to the *time* and *place* of residence of voters. This provision, on account of not being prospective in effect, struck the ballot from the hand of thousands of persons who were allowed to vote at the adoption of the

constitution, but who were denied the right at the election on the 3d of November for Congressmen. Under the constitution of 1868, and the act of admission, the State of Arkansas was prohibited in plain and express terms from making any alterations in regard to the "time and place of residence" of electors. Yet, in the face of this inhibition, the Garland constitution requires a residence of six months in the county, when there was no such requirement before, and a residence of one month in the township when none was required under the constitution of 1868. The object of the proviso was to keep the ballot in the hands of every person that became entitled to it under the constitution of 1868, no matter how often the constitution might be changed. The compact is just as much violated by striking out six months and inserting twelve as though they had stricken out six months and inserted twelve years. If they had the right to do the one, they had the right to do the other. That this compact is binding on the people of the State of Arkansas I apprehend will not be questioned, except by those who deny the validity, force, and effect of the reconstruction acts. Compacts of one character and another have been assented to by all the States of the Union, save the original thirteen, and in most instances they have been sacredly observed.

Under the first act of admission, (June 23, 1836,) the State of Arkansas, by the terms of her compact, agreed that no tax should be imposed on the lands and property of the United States; that non-resident proprietors should not be taxed higher than resident; that the lands granted soldiers for military services should not be taxed for three years. The ordinance of 1787, in relation to the Northwestern Territory, among other things inhibited any of the States formed out of that Territory flom establishing or maintaining slavery. Judge McLean, of the Supreme Court of the United States, in the case of *Spooner* v. *McConnell*, (1 McLean, 342,) goes into this question at great length and exhausts it. When Virginia assented that Kentucky might become a separate and independent State, it was a part of the compact that the title to the lands in that State should be determined by the laws of Virginia. Afterward Kentucky passed other laws upon the subject and the courts held the legislation of Kentucky violated the compact and declared the subsequent law a nullity.

But it may be said that Congress had no right to require such a condition, and that the States have the sole right to fix the qualifications of electors. The assertion of a doctrine like this would be nothing *new*. Why, sirs, Andrew Johnson asserted the same doctrine in 1868, in his message vetoing the bill for the admission of Arkansas. The attention of Congress was directly called to that feature of the bill, and Congress passed it by a two-thirds vote of each House over his veto. In the face of that vote, with the attention of Congress called directly to the question of its power, an argument from me would be a work of supererogation.

No doubt, sirs, you will be told that the people of Arkansas have cured all the defects and irregularities mentioned *by* "*acquiescence*." Now, let us see if this be true. Where is the evidence of acquiescence? What witness testified to it? I say to you that there never has been any acquiescence in the matter, save such as the prisoner yields to his captor, and such as the prudent have indulged to avoid violence and bloodshed. Under the decision of the President, the people of Arkansas, that is, that portion of them that adhere to the government of 1868, as law-abiding citizens, were bound to recognize Elisha Baxter as the governor *de facto* of the State of Arkansas. No matter how erroneous

the President's decision may have been, the people of Arkansas had but one of two things to do: to array themselves against the power and authority of the United States Government, or to quietly submit until such time as their grievances could be redressed by Congress, the only tribunal to which they could apply. In May last the House appointed a committee to inquire into the condition of affairs in Arkansas, and we have been laboring assiduously ever since that time to redress our grievances. It is true the legislature, or rather a body of men that Baxter calls a legislature, has been in session since the time the President said the determination of who is governor of Arkansas was a question for the determination of the general assembly; but during the greater portion of the time it was in session Elisha Baxter had it surrounded with armed sentries, through which the members of the legislature themselves could only pass by virtue of the passes of one of Baxter's officers. On the day after the recognition of Baxter as governor, by the President, the bill calling a constitutional convention was passed, calling a convention to meet in July. The legislature was in session but seventeen days, all told, during which time it passed a bill preventing the supreme court from convening until the 4th Monday in November; an act suspending officers from the exercise of their duties after the house had passed articles of impeachment against them; and in three days thereafter passed articles of impeachment against every officer of state who would not resign, both executive and judicial, without taking a scintilla of testimony, as the evidence before the committee shows, charging them with treason, an offense that is not a cause of impeachment under the constitution of the State. This last-mentioned act also authorized the governor to appoint other persons to act during the suspension of the persons the house had impeached. In filling the three vacancies on the supreme bench occasioned by impeachment, he appointed his leading counsel in the *quo-warranto* and in the Brooks-Baxter case chief-justice, and the associate counsel associate justice. The office of attorney-general he filled with one of his brigadier-generals; the office of treasurer of state with a major-general; the office of superintendent of the penitentiary with another major-general; and the office of commissioner of public lands and immigration with one of his newspaper editors and an agent of the associated press, as a compensation for falsehoods told and to be told. During all this time martial law prevailed, and State troops were regularly on duty and in barracks at the State-house, and at the private residence of the governor. The legislature had adjourned, and we could not prosecute a contest there. The convention act was so amended as to read as follows:

"That all judges of this State are prohibited from issuing any writ or process whatever, or of taking any action, or assuming any jurisdiction in or about or in connection with the election provided for in the act to which this is supplemental and amendatory."

This act ousted the jurisdiction of the judges at chambers, and the act of May 27, 1874, adjourns the circuit courts all over to the fall terms, none of which were to be holden until after the constitutional convention adjourned. From this statement you will see that all the avenues through which legal redress could be sought were closed. All that we could do was to sit quietly by and submit to the things going on around us, or rise in arms against them with a full knowledge that not only the partisan militia of Baxter would be arrayed against us, but the entire power of the Federal Government. Preparatory to turning the State government over to Garland, commenced the organization of

a militia, purely of a partisan character; for I assert here that in all the militia organizations of the State there is not one person who is recognized as a republican in it from the highest to the lowest; so that, when the time came to make the change, so that when the time came to make an absolute delivery of the property, a force sufficient to protect it would be on hand. It was a strangely-organized government. First, they began with the county officers, and installed them, in most instances, by violence and force, or under such circumstances as would have rendered resistance useless. This done, the circuit judges and prosecuting attorneys were inducted into office. This done, a supreme court followed. This done, then followed the legislature. The legislature counted the votes cast for executive officers, and declared the result. The persons thus declared elected qualified and took possession. The officers of the State were quietly and peaceably given up, with the exception of the office of governor. Bear in mind that the officers who quietly yielded up the offices of State were not the persons declared elected under the constitution of 1868, but were *the appointees of Baxter*, whom he had appointed to fill forced vacancies, or to act during the suspension of the officers against whom the house had passed articles of impeachment, and the legislature had adjourned without giving them an opportunity to be heard. When all this *was accomplished*, Baxter turned the office of governor over to Garland, who, the moment he took possession, stood at the head of an organized government, and in possession of its arms and munitions of war. So long as Baxter held on to the State government there was no power to interfere, and no courts to apply to if there had been. It was only when Baxter abandoned and abdicated the governor's office that any legal steps could be taken to sustain the government formed by the constitution of 1868. When Baxter abandoned the office of governor, the lieutenant-governor applied to the President for aid, and that application has been referred, by the President, to Congress. It is true there has been no great amount of violence, or resistance to the Garland government; but there has been no "*acquiescence*" on the part of those chosen to fill the different departments of government.

In law there is no difference between rights acquired by fraud and connivance, and those acquired by violence. I can see no difference between one who holds *by force* what was acquired by fraud, and one who by force acquires a thing and employs force to hold it. There was no domestic violence in Louisiana two days after Penn drove Kellogg from the State-house. There was profound peace and quiet in the city of New Orleans, and the same kind of peace that existed there exists in Arkansas.

If the same policy had been pursued in the Arkansas case that was pursued in the Rhode Island case we would not be here asking congressional interference. By the action of President Tyler each citizen of Rhode Island was given to understand his exact status more than thirty days *before* the commission of any overt act in the defense or support of what he believed to be the true government of the State; but as matters now stand, and as they have stood since the day Baxter abandoned the executive office and turned the same over to Garland, every man in Arkansas who resorted to arms to resist the Garland usurpation was asked to *stake his life* that the President or Congress would sustain *his* view of the case. In view of the fact that this committee was charged with the duty of ascertaining whether there was a government, republican in form, administered by the persons chosen in the manner prescribed by the constitution and laws of the State, and in view of the

fact that Congress is clothed with power to grant the pursued the paths of peace instead of those of disorder and domestic violence. If we have failed in our pursuit of Elisha Baxter, to wrest from him the office of governor, from the day Mr. Brooks presented his petition to the House of Representatives up to the present hour, it is attributable to a want of knowledge and lack of experience, rather than a want of disposition. We have chased him like a thief having stolen property in possession, until he has been compelled to throw the property from him; and we find him here to-day as the attorney of the receivers of stolen property *he* could no longer retain himself. It now remains for you and Congress to say whether we shall have our property, having fully identified it.